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In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must have an "employment-related connection to a vessel in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel"?

STATEMENT REGARDING PARTIES

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Willard Stewart respectfully requests this Court to grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The court of appeals issued two reported opinions in this case. The opinion after final judgment (*Stewart II*) is reported at 343 F.3d 10 (CA1 2003) and reprinted as Appendix A, *infra*, at App. 1. The opinion on the interlocutory appeal (*Stewart I*), which addresses the question presented here, is reported at 230 F.3d 461 (CA1 2000), unofficially reported at 2001 AMC 1116, and reprinted as Appendix B, *infra*, at App. 15.

Neither of the district court's summary judgment orders has been reported. The district court granted summary judgment on the vessel status issue from the bench. The transcript of the hearing is reprinted as Appendix E, *infra*, at App. 33. The court granted summary judgment on the remaining claim in a handwritten notation on respondent's summary judgment motion. This motion, including the notation, is reprinted as Appendix C, *infra*, at App. 30, and the formal judgment is reprinted as Appendix D, *infra*, at App. 32.

JURISDICTION

The court of appeals entered judgment on September 4, 2003. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had admiralty jurisdiction under 28 U.S.C. § 1333(1) and the Jones Act, 46 U.S.C. App. § 688(a).

RELEVANT STATUTORY PROVISIONS

Appendix F, *infra*, at App. 68, reprints 1 U.S.C. § 3 (defining "vessel"); the Jones Act, 46 U.S.C. App. § 688; and section 2(3)(G) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(3)(G).

STATEMENT OF THE CASE

Petitioner Willard Stewart was a marine engineer assigned to respondent's dredge *Super Scoop*. In 1993, the *Super Scoop* – with the assistance of two scows – was dredging a trench across Boston Harbor as part of the construction of the Ted Williams Tunnel. The dredge used its clamshell bucket to scoop sediment from the ocean bottom into one of the scows. When a scow was full of dredged material, it was towed out to sea and dumped.

The Coast Guard classifies the *Super Scoop* as an "industrial vessel." The *Super Scoop* has the typical physical characteristics of a conventional dredge, such as navigational lights, ballast tanks, and a crew dining area. It is registered with the Coast Guard, and it is required to comply with safety regulations issued by the Coast Guard and the Department of Transportation. It has a load line certificate issued by the American Bureau of Shipping. And it is equipped with a global positioning system to enable it to navigate its planned route precisely.

The *Super Scoop* has only limited means of self propulsion. It is moved long distances by tug. To work on the Ted Williams Tunnel project, for example, the dredge was towed from its home base in California, through the Panama Canal, and up the eastern seaboard to Boston Harbor. It can move itself short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench, the *Super Scoop* typically moved twelve times per day by tightening and slacking its cables.

On July 15, 1993, petitioner was working on board one of the scows. While petitioner was on deck, about ten feet above the engine area, the scow (without warning) began to move. It then collided with the *Super Scoop*, causing petitioner to fall headfirst through an open hatch (from which the protective railing had been removed) down to the engine area below. He was seriously injured.

Petitioner filed the present action in the U.S. District Court for the District of Massachusetts, invoking the court's admiralty jurisdiction under 28 U.S.C. § 1333(1) and the Jones Act, 46 U.S.C. App. § 688(a). Petitioner

claimed under the Jones Act, which provides a negligence remedy for injured seamen. In the alternative (in the event that he were found not to qualify as a seaman), he also sought recovery under section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b).

In 1999, the district court granted summary judgment for respondent on the Jones Act claim, holding that petitioner did not qualify as a seaman under the First Circuit's standard announced in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992). *See* App. 65-66. *DiGiovanni* held that a barge or other float whose primary purpose was not navigation or commerce is a Jones Act vessel "only when it is in actual navigation or transit" at the time of the plaintiff's injury. *See* 959 F.2d at 1123; *see also infra* at 6-7 (discussing *DiGiovanni*).

As this is an admiralty case, petitioner was entitled to an interlocutory appeal under 28 U.S.C. § 1292(a)(3). On this appeal (*Stewart I*), the First Circuit affirmed, holding that *DiGiovanni* compelled the district court's conclusion. *See* App. 22-27. In the First Circuit's view, the *Super Scoop*'s "primary purpose" was dredging, "a form of construction," and thus not navigation or commerce. App. 27. And it was not in motion at the time of petitioner's injury.

Although *Stewart I* held against petitioner on the vessel status question, it did not finally resolve the lawsuit; petitioner still had a claim for the same damages under LHWCA § 5(b). Knowing that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J.), and that this Court could review the vessel status question after final judgment if he were unsuccessful on his LHWCA claim, *see, e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam), petitioner returned to the district court to resolve the remaining issues.

On remand, the district court granted summary judgment for respondent on the LHWCA claim, *see* App. 30-31, and entered final judgment, *see* App. 32. Petitioner again appealed to the First Circuit. While adhering to his argument that the *Super Scoop* was a Jones Act vessel, he also argued that the district court had erred in denying his LHWCA claim. The court of appeals again affirmed. *See* App. 1-14 (*Stewart II*). As this petition does not raise the LHWCA question, only one aspect of the *Stewart II* opinion is relevant here. The court accepted that the *Super Scoop* was a vessel for LHWCA purposes because "the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used in evaluating seaman status under the Jones Act.'" App. 5 (quoting *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (CA1 1996) (en banc), *cert. denied*, 520 U.S. 1117 (1997)).

REASONS FOR GRANTING THE PETITION

Congress provided generous remedies to seamen under the Jones Act, 46 U.S.C. App. § 688, and left it to the courts to define the key term "seaman."[1] From 1958 to 1991, this Court "relegat[ed] [the task of defining 'seaman' to the lower courts," which led to "a 'myriad of standards and lack of uniformity in administering the elements of seaman status.'" *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 494 (1983)).

In the 1990s, this Court decided four cases that resolved most of the confusion that had arisen in the preceding three decades. *Wilander* addressed the type of activities that a seaman must perform. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), clarified the coverage

[1] Congress offered some assistance in LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G), which excludes "a master or member of a crew of any vessel" from LHWCA coverage. *See infra* at 17-19 (discussing § 2(3)(G)); App. 70 (quoting § 2(3)(G)).

boundary between the Jones Act and LHWCA, 33 U.S.C. §§ 901-50. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), explained the type of relationship that a seaman must have to a vessel. And *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), defined the "fleet doctrine," which enables a seaman to prove his status through a substantial connection to a fleet of vessels under common ownership or control.

While this Court has thoroughly discussed most of the required elements of "seaman" status, one significant requirement remains unclear.[2] It is well established that a Jones Act seaman must have an "employment-related connection to a vessel in navigation," *Latsis*, 515 U.S. at 357; *Wilander*, 498 U.S. at 355, but this Court has never addressed the vessel status requirement under the Jones Act. Indeed, it does not appear to have directly addressed the meaning of the term "vessel" (in any context) since 1903. *See The Robert W. Parsons*, 191 U.S. 17 (1903) (holding that a horse-drawn canal boat used on the Erie Canal was a vessel). During the ensuing century, the maritime industries have developed considerably, and "special purpose" vessels have played an increasingly prominent role. New guidance is urgently required.

The "'myriad of standards and lack of uniformity in administering the elements of seaman status,'" which this Court recognized in *Wilander*, have now largely been

[2] *See generally, e.g.*, John R. Hillsman, *Still Lost in the Labyrinth: The Continuing Puzzle of Seaman Status*, 15 U.S.F. MAR. L.J. 49, 54 (2003) ("Apart from resolving the conflict over vessel status, the Supreme Court has largely done its part."); Jack L. Allbritton & David W. Robertson, *Seaman Status After Chandris, Inc. v. Latsis*, 8 U.S.F. MAR. L.J. 29, 71 (1995) ("*Wilander*, *Gizoni*, and *Latsis* have clarified the law of seaman status considerably, but significant unanswered questions remain. These include the proper definition of a vessel [and] the significance of the *Latsis* Court's disapproval of what it termed the 'snapshot' approach. . . . "). The other "significant unanswered questions" identified in Allbritton & Robertson were resolved in this Court's subsequent *Papai* decision.

corrected. One major piece of unfinished business remains. A "myriad of standards" and a "lack of uniformity" are still apt descriptions for the law of vessel status. At least eight circuits have addressed the issue, and they have developed almost as many separate standards. The present case provides this Court with an ideal vehicle to announce one uniform standard for Jones Act vessel status, thus completing the task that it began in *Wilander*.

I. The state and lower federal courts are in irreconcilable and acknowledged conflict on the "vessel" requirement for "seaman" status under the Jones Act

The decision below reinforces an extreme position in an eight-circuit conflict. Courts and commentators have recognized the multiple conflicts. This Court's guidance is demonstrably required.

A. The First Circuit

The First Circuit established its current test for vessel status in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992), which sought to resolve the tension between its earlier decisions in *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (CA1), *cert. denied*, 414 U.S. 856 (1973), and *Bennett v. Perini Corp.*, 510 F.2d 114 (CA1 1975). *DiGiovanni* concerned a crane barge being used in bridge construction. "In all respects it met the commonly understood characteristics of a vessel,"[3] 959 F.2d at 1120, but in the court's view it was

[3] In light of *DiGiovanni*'s recognition that its barge would commonly be recognized as a vessel, some have argued that the decision is concerned not with vessel status but with the meaning of the phrase "vessel in navigation." *See, e.g.*, Hillsman, 15 U.S.F. MAR. L.J. at 66-70. This effort to excuse *DiGiovanni* is doubtful. The phrase "in navigation" does not mean "in motion," but contrasts with "out of navigation" or "withdrawn from navigation" (e.g., for an overhaul or substantial repairs). This Court addressed the distinction in *Latsis*, *see* 515 U.S. at 372-76, and the *DiGiovanni* court was well aware of it, *see* 959 F.2d at

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being used simply as a floating platform to support what was essentially shore-based work. The court concluded:

> A worker becomes a seaman not by reason of the physical characteristics of the structure to which he is attached, but because its being operational "in navigation" exposes him to "a seaman's hazards." He is not exposed by what the vessel did in the past, or by its future potential. . . . In sum, if a barge, or other float's "purpose or primary business is *not* navigation or commerce," then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.

Id. at 1123 (emphasis in original) (quoting *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 829 (CA5 1984)). In reaching this conclusion, the court relied on what it perceived to be the latest trend in Fifth Circuit jurisprudence. *See id.*

A vigorous dissent in *DiGiovanni* observed that the majority went "far beyond what the Fifth Circuit, or for that matter any circuit, has decided, and will create a new split rather than mend old ones." 959 F.2d at 1128 (Torruella, J., dissenting). Judge Torruella argued that the statutory definitions of "vessel" in at least twenty-seven different maritime laws showed Congress's intent to treat this barge as a vessel, *see id.* at 1129-31 (appendix listing various statutory definitions, including 1 U.S.C. § 3), and he predicted that the new rule would create uncertainty and encourage litigation, *see id.* at 1128.

Stewart I not only adhered to *DiGiovanni* but applied its restrictive standard even more narrowly. Whereas *DiGiovanni* had involved a crane barge moored to a bridge

1121 ("a vessel does not cease to be a vessel when she is not voyaging but is at anchor, berthed, or at dockside"). In any event, the decision below has resolved any ambiguity as to *DiGiovanni*'s intent, for it clearly analyzes this as a vessel status case (and uses the phrase "in transit" to refer to the movement required under the *DiGiovanni* test).

(legally an extension of the land), the *Super Scoop* was a dredge in the middle of Boston Harbor. The *DiGiovanni* dissent's fears have been realized, but this case demonstrates that the First Circuit will not make any effort to bring itself into line.

B. Federal and state court decisions following the restrictive First Circuit rule

1. The Sixth Circuit. One federal circuit has adopted the restrictive First Circuit rule. In *Hatch v. Durocher Dock & Dredge, Inc.*, 820 F. Supp. 314 (E.D. Mich. 1993), *aff'd*, 33 F.3d 545 (CA6 1994), the district court described the test used by the Fifth Circuit, contrasted it with the First Circuit rule that had recently been announced in *DiGiovanni*, and "adopt[ed] the *DiGiovanni* test for determining whether a structure is a 'vessel.'" 820 F. Supp. at 316. On appeal, the Sixth Circuit agreed that the First Circuit's standard was preferable to the Fifth's. *See* 33 F.3d at 547-48.

2. The California state courts. Two California appellate decisions have also adopted the *DiGiovanni* test. *See Spears v. Kajima Engineering & Construction, Inc.*, 101 Cal. App.4th 466, 475-78, 124 Cal. Rptr.2d 97, 103-06 (2002); *Gault v. Modern Continental/Roadway Construction Co.*, 100 Cal. App.4th 991, 1000-02, 123 Cal. Rptr.2d 85, 91-92 (2002).

C. The Fifth Circuit

This Court has recognized the Fifth Circuit as the leader in Jones Act jurisprudence because it reviews more seamen's cases than any other circuit. *See, e.g., Latsis*, 515 U.S. at 365. Thus it is no surprise that the Fifth Circuit has had the lion's share of vessel status cases, including Judge Wisdom's seminal opinion in *Offshore Co. v. Robison*, 266 F.2d 769, 779-80 (CA5 1959) (holding that the Jones Act vessel definition "includ[es] special purpose structures not usually employed as a means of transport

by water but designed to float on water," relying in part on the fact that "the law [has] develop[ed] naturally along with the development of unconventional vessels").[4]

There have been scores of vessel status cases in the Fifth Circuit since *Robison*. The most significant are summarized in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 347-50 (CA5 1998), the court's most recent decision on point.[5] The *Manuel* court explained that two lines of cases had developed in the Fifth Circuit. In the more expansive line, the court had "held a variety of special purpose structures, far removed from the conventional notion of ships and seagoing barges, to be vessels." *Id.* at 348. These "structures" included "floating dredges," *id.*, a variety of drilling barges, derrick barges, and spud barges, "even though they also served, in part, as work platforms," *id.* at 347. In the more restrictive line, the court had "held that a variety of structures utilized predominately as work platforms are not vessels." *Id.*; *see also id.* at 349-50 (describing these cases).

The *Manuel* court reconciled the two lines of cases, and in doing so it elevated the significance of the expansive line (based on *Robison*) and minimized the restrictive line (on which *DiGiovanni* had relied). The court declared that "evaluating the importance of the craft's transportation function is the key to determining the craft's status," *id.* at 351, and then immediately stressed "that a vessel can serve the dual function of transporting cargo, equipment, or

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[4] This Court has strongly endorsed Judge Wisdom's *Robison* analysis on other aspects of the seaman status issue. *See Latsis*, 515 U.S. at 365-68; *Wilander*, 498 U.S. at 354-55.

[5] In the five years since *Manuel*, the Fifth Circuit does not appear to have faced the vessel status question in anything resembling the present context. *Cf. Fields v. Pool Offshore, Inc.*, 182 F.3d 353 (CA5 1999) (holding that a Jones Act claim had been fraudulently pleaded in alleging that a "spar," which was indefinitely secured to the ocean floor, was a vessel), *cert. denied*, 528 U.S. 1155 (2000); *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340, 346 n.1 (CA5 1999) (alluding to vessel status, which was not at issue in the case).

persons across navigable waters and acting as a work platform," *id*. Thus the *Manuel* barge (known as "Rig 3") not only served as a platform to support the "workover rig" bolted to it, it also transported the rig to each job site. The court explained:

> The transportation function . . . was not merely incidental. Rig 3's mobility was essential to the work it was designed and built to perform. . . . The mobility of Rig 3 allowed it to service wells located in various places on navigable waters. Rig 3 did more than merely float or move upon navigable waters: It transported all of the necessary equipment across navigable waters to each location. While Rig 3 did serve as a work platform when stationed over wellheads, this does not detract from the importance of its transportation function. Other special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status. . . . Rig 3 was designed *both* to support the workover rig *and* to transport it on a regular basis from one jobsite to another.

Id. (emphasis in original). Rig 3 was accordingly held to be a vessel as a matter of law.

In the quoted passage, the Fifth Circuit not only rejected the *DiGiovanni* test (noting that "special purpose craft . . . remain stationary while performing work, yet retain their vessel status"), it also explained why the *Super Scoop* would have been a vessel under the Fifth Circuit's standard. Everything that *Manuel*'s barge did for its workover rig, the *Super Scoop* did for the clamshell bucket and other dredging equipment that it carried.[6]

[6] The direct conflict between the First and Fifth Circuits is highlighted by the ease with which the *Manuel* language can be adjusted to address the present facts:

(Continued on following page)

Even if *DiGiovanni* was consistent with one line of Fifth Circuit cases at the time it was decided (which is doubtful), the *DiGiovanni* standard is plainly inconsistent with the Fifth Circuit's current approach.

D. Variations on the Fifth Circuit rule

At least two courts of appeals follow approaches that are based on Fifth Circuit jurisprudence, although their rules – like the First Circuit's – differ from the Fifth Circuit's current standard.

1. The Second Circuit. In *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30 (CA2 1996), the Second Circuit carefully reviewed the "new rule" announced in *DiGiovanni* and concluded that it was "substantially" different from the Fifth Circuit's (despite the First Circuit's effort to rely on Fifth Circuit precedent). *Id*. at 34. The *Tonnesen* court "decline[d] to follow [*DiGiovanni*'s] restrictive interpretation." *Id*. It instead modified the Fifth Circuit standard in a different way, *id*., and announced the following new standard:

> Our test . . . considers (1) whether the structure was being used primarily as a work platform during a reasonable period of time immediately

> [The *Super Scoop*'s] mobility was essential to the work it was designed and built to perform. . . . The mobility of [the *Super Scoop*] allowed it to [travel to Boston Harbor and dredge a trench across the harbor]. [The *Super Scoop*] did more than merely float or move upon navigable waters: It transported all of the necessary [dredging] equipment across navigable waters to each location. While [the *Super Scoop*] did serve as a work platform when stationed [at a particular point along the trench], this does not detract from the importance of its transportation function. . . . [The *Super Scoop*] was designed *both* to support the [dredging equipment] *and* to transport it on a regular basis from one jobsite to another [and along the trench during the dredging project].

Manuel, 135 F.3d at 351 (emphasis in original).

> preceding the accident; (2) whether the structure was moored or otherwise secured at the time of the accident; and (3) whether, despite being capable of movement, any transportation function performed by the structure was merely incidental to its primary purpose of serving as a work platform.

Id. at 36. Because the district court had followed *DiGiovanni*, the Second Circuit reversed the judgment and remanded the case for the application of its newly-announced standard.

In sum, the Second Circuit has created a new standard that is avowedly different from the First's and the Fifth's. Moreover, it has explicitly held that its divergence from the First Circuit is so substantial that judgments entered under the *DiGiovanni* rule must be reversed. *See also Tramutola v. City of New York*, 104 F.3d 356 (CA2 1996) (Table) (reported in full at 1996 U.S. App. LEXIS 30975, *3, 1996 WL 687983, *1) (reiterating that "[t]he *Tonnesen* court considered and rejected the *DiGiovanni* 'primary purpose' standard in favor of a less restrictive test.").

2. The Eleventh Circuit. At its creation, the Eleventh Circuit inherited all of the prior jurisprudence of the "old" Fifth Circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (CA11 1981) (en banc), including the *Robison* line of cases. Since the 1981 split, however, while the Fifth Circuit has been emphasizing its more expansive line of cases, *see supra* at 9, the Eleventh Circuit has taken a more restrictive approach. In *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (CA11 1990), the court held – on facts that were functionally identical to those before the Fifth Circuit in *Manuel* – that a spud barge could not qualify as a Jones Act vessel.

E. The Seventh Circuit

The Seventh Circuit sees relatively few Jones Act cases, and its vessel status standard is ambiguous. In *Johnson v.*

John F. Beasley Construction Co., 742 F.2d 1054, 1063 (CA7 1984), *cert. denied*, 469 U.S. 1211 (1985), the court announced an expansive[7] standard:

> Any floating structure, including those designed for special purposes, is a "vessel" . . . so long as the structure at some time serves as a means of transport on water.

But the Seventh Circuit viewed the definition as "inextricably intertwined" with its in-aid-of-navigation test for seaman status, 742 F.2d at 1063 n.9, which this Court later rejected in *Wilander*. Thus it may be that the Seventh Circuit will abandon its expansive definition (although nothing in *Wilander* casts doubt on it). Most recently, in *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379 (CA7 2001), the Seventh Circuit simply followed Fifth Circuit precedents to hold that a riverboat casino was a vessel – the same result it would have reached under its expansive definition.

Whichever approach the Seventh Circuit takes – *Johnson* or *Weaver* – it is in confliet with the *DiGiovanni* rule that the court of appeals applied in the decision below.

F. Expansive vessel status standards

Although it is unclear whether the Seventh Circuit will ultimately adhere to its expansive definition, two other circuits have consistently taken an expansive approach.

1. The Third Circuit. The Third Circuit has announced no clear standard for determining vessel status under the Jones Act, but in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (CA3 1975), *cert. denied*, 423 U.S. 1054 (1976), it followed an approach unlike that of any other circuit. The district court had held that the barge at

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[7] The Seventh Circuit recognized that its definition was expansive: "About the only floating structures unable to act as a means of transport on water are [fixed] off-shore drilling platforms . . . and dry docks or floating docks that are regarded as nothing more than extensions of land." 742 F.2d at 1063 n.8.

issue was not a "vessel in navigation," but the court of appeals disagreed on the theory that "the Supreme Court has extended [the Jones Act] remedy so as to permit claims" in a much broader context. *Id.* at 37 (citing *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (per curiam); *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam)). This expansive approach conflicts sharply with the restrictive First Circuit test. Both the *DiGiovanni* barge and the dredge in this case are more like traditional vessels than, for example, the submerged drilling barge in *Gianfala*.[8]

2. The Ninth Circuit. Although "[t]here is no generalized test in the Ninth Circuit for determining [Jones Act vessel status]," *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1135 (CA9 2002), that court has consistently taken the most expansive approach of any circuit. *Martinez*, for example, held that "a seaworthy fish processing barge that is towed across navigable waters twice a year can qualify as a 'vessel in navigation' [under] the Jones Act," *id.* at 1134, because the barge did not satisfy the court's criteria for *excluding* vessel status:

> [F]loating structures should not be classified as vessels in navigation if they are "incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate."

Id. at 1135 (quoting *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 660 (CA9 1992)). The *Martinez* fish processing barge was not quite permanently moored: although it was moored throughout the time the plaintiff was onboard, it was towed from Seattle to Alaska at the start of each fishing season and back again at the end. *Id.* at 1136. In addition, the *Martinez* vessel served a transportation

[8] The *Gianfala* court of appeals described the barge in its opinion denying seaman status. *See Texas Co. v. Gianfala*, 222 F.2d 382, 384-85 & n.2 (CA5 1955), *rev'd*, 350 U.S. 879 (1955) (per curiam). *See also infra* note 11.

function, albeit one that was "incidental to its primary purpose of serving as a floating fish processing factory." *Id.*

It appears from the Ninth Circuit's decisions that every floating structure qualifies as a Jones Act vessel unless it meets all four of the *Kathriner* criteria. In *Martinez*, for example, the vessel was apparently incapable of independent movement and needed to be towed. *Id.* at 1134. The vessel in *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1328 (CA9 1983), "was constructed [and used] for a purpose other than the transportation of persons or things." Similarly, in *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138, 1142 (CA9) (*Gizoni II*), *cert. denied*, 516 U.S. 944 (1995), the court rejected a jury instruction requiring a transportation function that was more than "merely incidental," noting the proper rule to be "that unusual-looking crafts whose purpose is not the transportation of people or things can be considered vessels under the Jones Act." 56 F.3d at 1142. The only floating structure for which the Ninth Circuit has rejected vessel status appears to be the fish processing plant in *Kathriner*. Not only had the converted Liberty ship been permanently moored, but "a large opening" had been cut in the hull to allow for dock traffic, with the result that it would surely sink if it were ever put out to sea. *See* 975 F.2d at 660.

In deciding *Martinez*, the Ninth Circuit explicitly rejected an invitation "to adopt a test established by the Fifth Circuit to determine whether a work platform qualifies as a vessel in navigation." 303 F.3d at 1136. The court reasoned that the Fifth Circuit test would be inconsistent with its own prior decisions. *See id.*

In addition to this acknowledged conflict, the Ninth Circuit approach is in conflict with practically every other circuit's. Both *Martinez* and *Gizoni II* are inconsistent with the First Circuit's *DiGiovanni* standard, for neither vessel was "in transit" at the time of the relevant injury. *See Martinez*, 303 F.3d at 1135; *Gizoni II*, 56 F.3d at 1140 n.1. The *Martinez* vessel did not satisfy any of the three criteria of the Second Circuit's *Tonnesen* test. *See supra* at 11-12 (quoting *Tonnesen*). Whereas the Fifth Circuit has held

that "evaluating the importance of the craft's transportation function" is the key to vessel status, *Manuel*, 135 F.3d at 351, the Ninth Circuit has held that a transportation function is unnecessary. *See Gizoni II*, 56 F.3d at 1142; *Wenzel*, 709 F.2d at 1328. Even the Seventh Circuit's more expansive approach, *see supra* at 12-13, is in conflict with the Ninth Circuit's, because one of the few things the Seventh Circuit requires is that "the structure at some time serves as a means of transport on water." *Johnson*, 742 F.2d at 1063. Finally, the Ninth Circuit is in direct conflict with the Eleventh Circuit, which has adopted a restrictive version of the Fifth Circuit standard. *See supra* at 12. Indeed, the only other circuit's approach that might be consistent with the Ninth's is the Third's, although it remains unclear how expansive the Third Circuit will be. *See supra* at 13-14.

G. Summary

The lower courts are in disarray on the vessel status issue. The First and Sixth Circuits have taken a restrictive approach producing results that would not be seen in any other federal court. At the other end of the spectrum, the Third, Ninth, and perhaps Seventh Circuits have taken much more expansive approaches. Even the three circuits in the middle (the Second, Fifth, and Eleventh Circuits) do not agree among themselves.

The courts of appeals have acknowledged their own disagreements. *See, e.g., Martinez*, 303 F.3d at 1136 (noting that its test differed from the Fifth Circuit's); *Tonnesen*, 82 F.3d at 34 (noting that its test differed from the First Circuit's *DiGiovanni* test and discussing the conflict between the First and Fifth Circuits). Lower courts have also recognized these conflicts. *See, e.g., O'Hara v. Weeks Marine, Inc.*, 928 F. Supp. 257, 259 (E.D.N.Y. 1996) (noting the conflict between the Second and Fifth Circuits); *Hatch*, 820 F. Supp. at 316 (discussing the conflict between the First and Fifth Circuits).

Finally, academic commentators have discussed the conflicts in the scholarly literature. *See, e.g.*, John R. Hillsman, *Still Lost in the Labyrinth: The Continuing*

Puzzle of Seaman Status, 15 U.S.F. MAR. L.J. 49 (2003) (noting that "conflicts had developed among the lower courts over the proper definition of the term 'vessel'" before *Latsis*); Jack L. Allbritton, *Seaman Status in Wilander's Wake*, 68 TUL. L. REV. 373, 400 (1994) (noting the conflict between the First and Fifth Circuits); Churchill H.D. Hooff, *Manuel v. P.A.W. Drilling & Well Service, Inc.: Special Purpose Drilling Barges and Jones Act Vessel Status*, 73 TUL. L. REV. 2155, 2161-63 (1999) (declaring that "circuits vary on which test they use," and noting the conflict between the First and Fifth Circuits, between the First and Second Circuits, and between the Fifth and Eleventh Circuits); Brett D. Wise, *Vessel Classification and the Work Platform Exception*, 70 TUL. L. REV. 691, 693 (1995) (noting the conflict between the First and Fifth Circuits).

The conflict has existed for several years, and it is growing wider. The decision below solidifies the most restrictive position. The Ninth Circuit's *Martinez* decision last year strengthened the expansive position. When the courts on the opposite ends of the spectrum show no signs of moving toward the center, it is obvious that the eight circuits involved will not be able to resolve the conflict without this Court's intervention.

II. The First Circuit rule is in tension with several of this Court's prior decisions

Although this Court has never directly addressed the precise question presented here, the First Circuit's restrictive rule is in tension with several prior decisions.

A. The decision below contradicts the line of cases holding that the term "seaman" in the Jones Act is defined by section 2(3)(G) of the Longshore and Harbor Workers' Compensation Act

Swanson v. Marra Brothers, Inc., 328 U.S. 1, 6-7 (1946), held that the Jones Act and LHWCA are mutually exclusive in their coverages. *Swanson* explained that the exclusion from LHWCA coverage of "a master or member

of a crew of any vessel," LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G), describes exactly those workers included in Jones Act coverage. In other words, the crewmember exclusion establishes the line of demarcation between the two statutes.

In *Wilander*, this Court took *Swanson* as its benchmark and explained the *Swanson* holding as follows:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

498 U.S. at 347. *See also Papai*, 520 U.S. at 553; *Latsis*, 515 U.S. at 355-56; *Gizoni*, 502 U.S. at 86-88.

Accordingly, the need to define "vessel" in this case arises not from the Jones Act's use of the term – the word "vessel" does not appear in the relevant portion of the Jones Act, 46 U.S.C. App. § 688(a) – but rather from LHWCA's use of the term. It is section 2(3)(G) that makes the meaning of "vessel" relevant.

Because this Court has repeatedly defined the "seaman" covered by the Jones Act as the "master or member of a crew of any vessel" who is excluded from LHWCA coverage, it follows that the inclusion and exclusion must have the same meaning. A "member of a crew of any vessel" qualifying as a Jones Act "seaman" must also be a "member of a crew of any vessel" excluded by LHWCA § 2(3)(G). It would undermine the mutual exclusivity of the two statutes if the phrase had different meanings for Jones Act and LHWCA purposes.

It necessarily follows that "vessel" must have the same meaning in the Jones Act and LHWCA contexts. Yet the court below held to the contrary. In *Stewart I*, it held that the *Super Scoop* was not a Jones Act "vessel." Then in *Stewart II*, it recognized that the *Super Scoop* was a LHWCA "vessel." *See* App. 5 (citing *Morehead*, 97 F.3d at 607). One of these conclusions must be wrong. Permitting inconsistent meanings of the pivotal term "vessel" would

bring a fundamental incoherence to the very center of this Court's delineation of seaman status.

B. The First Circuit rule is inconsistent with this Court's approach to seaman status as explained in *Chandris, Inc. v. Latsis* because the First Circuit has adopted a "snapshot" approach

The *Latsis* plaintiff argued "that any maritime worker who is assigned to a vessel for the duration of a voyage – and whose duties contribute to the vessel's mission – should be classified as a seaman for purposes of injuries incurred during that voyage." 515 U.S. at 361. In rejecting this argument, the *Latsis* Court explained that "courts should not employ 'a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury.' " *Id.* at 363 (quoting *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 5 (CA5 1992), *cert. denied*, 506 U.S. 1050 (1993)).

Despite this guidance, the First Circuit adheres to a test for vessel status – a key part of the seaman status inquiry – that "inspect[s] only the situation as it exists at the instant of injury." Under *DiGiovanni*, the First Circuit takes a snapshot of a special purpose watercraft at the moment of the plaintiff's injury. If the *Super Scoop* had been in motion when petitioner was injured, then the *DiGiovanni* test would have recognized petitioner to be a seaman.

Latsis addressed the proposed "snapshot" test in the context of a worker's connection with a vessel rather than in defining a vessel, but there is no logical reason why a snapshot test should be any less objectionable here. Both the vessel-connection inquiry and the vessel-status inquiry are part of the seaman status question, and this Court rejected the "snapshot" suggestion in broad seaman status terms.[9] The disadvantages identified by the Court (*e.g.*,

[9] Commentators have recognized that the "snapshot" approach in *DiGiovanni* is in tension with this Court's rejection of the same approach in *Latsis*. *See, e.g.*, Allbritton & Robertson, 8 U.S.F. MAR. L.J.

(Continued on following page)

creating a system whereby workers oscillate back and forth between Jones Act coverage and other remedies; employers being unable to predict who will be covered by which statute during the day) apply with equal force in either context. Even if *Latsis* does not overrule *DiGiovanni*, therefore, the two approaches are seriously inconsistent.

C. The decision below is in tension with this Court's decisions recognizing vessel status for dredges and comparable watercraft

This Court has assumed in prior cases that a stationary special purpose watercraft such as a dredge can qualify as a Jones Act vessel. Most directly on point is *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957),[10] in which the Court upheld the Jones Act claim of a member of the crew of a dredge that was anchored to the Illinois shore of the Mississippi River "during all the time petitioner worked for [the vessel owner]." *Id.* at 372; *see also id.* at 376 (Harlan, J., dissenting) (the plaintiff "never even saw [the dredge] being moved"). The Court clearly assumed that a dredge could be a vessel (although the issue was not directly raised, *see id.* at 371 n.1; 375 n.1 (Harlan, J., dissenting)). Moreover, the Court specifically

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at 71 n.295 (they are "arguably inconsistent"); Hillsman, 15 U.S.F. MAR. L.J. at 67 (noting *DiGiovanni*'s "improper 'snapshot' or 'moment of the injury' test"); Wise, 70 TUL. L. REV. at 714-15 (*DiGiovanni* approach "does not comport well with [*Latsis*]").

[10] *Gizoni* is also closely analogous. This Court explicitly recognized that "several floating platforms, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge," 502 U.S. at 83, could be Jones Act vessels. *See id.* at 92 (declaring that "[s]ummary judgment was inappropriate" on, among other issues, the vessel status question because plaintiff had alleged sufficient facts to support a jury finding that the barges were vessels). In fact, the barge on which plaintiff was injured was not in motion at the time of the injury. *See Gizoni II*, 56 F.3d at 1140 n.1. There is no suggestion that the barge's activity at the time of the injury was relevant to this Court's view of its vessel status, but the Court may nevertheless have assumed that the barge was in motion at the time. *See* 502 U.S. at 84.

discussed the dredge's failure to be in transit at the time of the seaman's injury (or, indeed, throughout his employment), and considered this lack of movement to be legally irrelevant.

In several other cases, this Court has implicitly recognized that stationary special purpose watercraft can qualify as Jones Act vessels, even when they are less like traditional vessels than the dredge here. Thus in *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam), for example, the Court viewed a submerged drilling barge as a Jones Act vessel.[11]

Outside of the Jones Act context, the Court has regularly recognized stationary special purpose watercraft as vessels. Most recently, in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), this Court allowed a barge owner to seek the protection of the Limitation Act, 46 U.S.C. App. §§ 181-88, thus implicitly recognizing a crane barge on a bridge construction project (much like the *DiGiovanni* barge) as a vessel. *See* Limitation Act § 3(a), 46 U.S.C. App. § 183(a) (providing benefits

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[11] *Gianfala* was a summary reversal with no real analysis, but the result necessarily assumes that the submerged drilling barge, *see supra* note 8, was a Jones Act vessel. Moreover, the Court's attention was specifically directed to this issue. The petition raised the question whether the "temporary immobilization of a vessel cause[s] an employee to lose his status as a seaman," Petition for Certiorari at 3, *Gianfala* (O.T. 1955, No. 395), and the petitioner argued that "the fact that this barge was temporarily immobilized at the precise moment of injury does not destroy the decedent's identity as a seaman or the barge's identity as a vessel," *id.* at 16.

The *Gianfala* Court relied on four cases to support its holding. It is noteworthy that two of these cases upheld Jones Act recoveries for crewmembers on dredges. *See* 350 U.S. at 879 (citing *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (CA6) (river dredge), *cert. denied*, 346 U.S. 817 (1953); *Gahagan Construction Corp. v. Armao*, 165 F.2d 301, 305 (CA1) (dredge in Boston Harbor), *cert. denied*, 333 U.S. 876 (1948)). In summarily reversing on the authority of these cases, the *Gianfala* Court must have assumed that the dredges were Jones Act vessels.

to "the owner of any vessel"); *cf.* 7A MOORE'S FEDERAL PRACTICE ¶ 215[5], at 2409 (2d ed. 1996) ("any structure that does not qualify as a 'vessel' . . . for Jones Act purposes should not qualify as a vessel for purposes of limiting liability") (footnote omitted).

III. The decision below cleanly presents an important issue that this Court should resolve

A. The vessel status issue is important and ripe for resolution

This Court recognizes the importance of the seaman status issue. In the last decade, it has devoted four cases to clarifying most of the requirements for seaman status. *See supra* at 4-5 (discussing *Wilander*, *Gizoni*, *Latsis*, and *Papai*). Vessel status is the last requirement that the Court must now address in order to complete the task.

The importance of the vessel status issue is underscored by the frequency with which the appellate courts are required to resolve vessel status disputes. The Jones Act is the central statute in the maritime tort field, *see, e.g.*, *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994), and thus it is litigated frequently. Seaman status is a requirement in every case, and vessel status is often at issue when a special purpose watercraft is involved. With the decline of the U.S. blue-water merchant marine, *see, e.g.*, WILLIAM A. LOVETT (ed.), UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 159 (1996) (table 6.1), most U.S. seamen now work on inland and coastal waters, often on special purpose craft. In view of the uncertainties that exist on the vessel status issue, it is no surprise how often litigants are required to go to the appellate level to resolve disputes.

The vessel status issue has percolated in the courts of appeals for many years. The Fifth Circuit has been directly grappling with the question presented here at least since *Robison* in 1959. In the process, it has examined scores of factual variations and tested several approaches. Other circuits have experimented with variations of the Fifth Circuit standard. Several circuits have multiple

reported appellate decisions. The First Circuit has taken the issue en banc. As a result of this long process, circuit court decisions offer this Court a wide range of possible standards to consider for national adoption. In short, the issue is ripe for this Court's review.

B. The widespread conflict creates serious problems for maritime workers and employers

This Court has also recognized the problems that arise from a lack of clarity on the key requirements for seaman status. Both maritime workers and employers (and their insurers) are disadvantaged when they cannot predict whether the Jones Act will cover a given worker. *See, e.g.*, *Latsis*, 515 U.S. at 363; *Papai*, 520 U.S. at 558. In the worst cases, maritime workers move in and out of Jones Act coverage many times during the course of a workday. *See, e.g.*, *Latsis*, 515 U.S. at 363.

Moreover, the problems are not limited to the Jones Act context. Seaman status defines the border between the Jones Act and LHWCA. *See supra* at 17-18 (discussing *Swanson* and subsequent cases). When the criteria for seaman status are unclear, the limits on LHWCA coverage are also unclear. In addition, the Jones Act criteria for seaman status also apply to claims for "unseaworthiness" and "maintenance and cure" (the general maritime law doctrines protecting seamen). *See, e.g.*, *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1499 (CA5 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1236 (CA8 1995); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192 (CA4 1991), *cert. denied*, 503 U.S. 907 (1992). Accordingly, the question presented here is central to defining the rights of practically every maritime worker.

C. This case offers an ideal vehicle to resolve this important issue

Unlike many cases presenting the vessel status issue in conjunction with questions about other requirements for seaman status, *see, e.g.*, *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 63 (CA2 2002) (declining to address vessel status

and deciding the case on other grounds), this case presents the vessel status question cleanly. It is undisputed that petitioner spent virtually all of his working time on the *Super Scoop*, *see Latsis*, 515 U.S. at 371, and that he contributed to its mission, *see Wilander*, 498 U.S. at 355. The case has now proceeded to final judgment, and the vessel status issue is the only question that remains. Thus nothing will distract the Court or prevent it from resolving the vessel status issue.

This case offers an ideal vehicle for the Court to resolve an entrenched, eight-circuit conflict on an important issue of maritime law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 3, 2003

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 02-1713

WILLARD T. STEWART,

Plaintiff, Appellant,

v.

DUTRA CONSTRUCTION COMPANY, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, *U.S. District Judge*]

Before

Torruella, Lynch and Howard,
Circuit Judges.

David B. Kaplan, with whom *Thomas M. Bond* and *The Kaplan/Bond Group* were on brief, for appellant.

Frederick E. Connelly, Jr., with whom *Peabody & Arnold LLP* was on brief, for appellee.

September 4, 2003

TORRUELLA, Circuit Judge. Plaintiff-Appellant Willard T. Stewart appeals a decision from the District of Massachusetts granting summary judgment to Defendant-Appellee Dutra Construction Company ("Dutra"), Stewart's employer and the owner of the vessel on which Stewart was injured. Following our decision in *Morehead* v. *Atkinson-Kiewit,* 97 F.3d 603 (1st Cir. 1996) (en banc), we affirm the district court's grant of summary judgment.

I.

Dutra is a dredging company hired by the Commonwealth of Massachusetts to perform drilling, blasting, and dredging work for an immersed tube tunnel under Boston Harbor, now known as the "Ted Williams Tunnel." Dutra used the dredge SUPER SCOOP and the Scow 4 for this work. The SUPER SCOOP is a typical dredge with a clamshell bucket; its function was to move through Boston Harbor, from East Boston to South Boston, digging the ocean bottom as it moved. The Scow 4 was used in conjunction with the SUPER SCOOP. It would be brought alongside the dredge and filled with sediment and dredging material that had been scooped from the ocean bottom by the SUPER SCOOP. Once filled, the Scow 4 would then transport the material out to sea for dumping.

In 1991, Dutra hired Willard Stewart, a marine engineer, to maintain the mechanical systems of the SUPER SCOOP. Stewart spent the majority of his time aboard the SUPER SCOOP, though occasionally he was required to perform maintenance tasks aboard the Scow 4. One such task occurred when the scow's engine malfunctioned, sometime in the middle of July, 1993. With the scow's engine out of commission, the scow doors could not

be opened or closed; as a result, dredging operations came to a temporary halt. To repair the scow, Dutra hired Southworth Milton, an independent contractor, which sent its representative, Timothy Angell, to repair the engine. Dutra also arranged for several of its employees, including Stewart, to assist in the repair process. Eventually it was determined that the engine was beyond repair and would need to be replaced.

Access to the engine was via a hatch on the Scow 4. The old engine was removed, and a new engine was lowered into the scow by means of a crane. At some point it was determined that a protective railing guarding the hatch obstructed the removal of the old engine. The protective railing was subsequently removed.

On July 15, 1993, Angell and Stewart were working aboard the Scow 4. Angell was working in the engine area, and had been for two or three days. Stewart was kneeling over the unguarded open hatch, about ten feet above the engine area, feeding wires through the hatch. While Stewart was precariously perched above the hatch, the SUPER SCOOP's crew moved the scow. At some point in the moving process, there was a jolt, and Stewart plummeted headfirst to a deck below. He was seriously injured.

Stewart filed a complaint for damages under the Jones Act, 46 U.S.C. § 688. The complaint was amended to add an alternative count for vessel negligence pursuant to § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, authorizing covered employees to sue the vessel as a third party for injury caused by the negligence of a vessel. Stewart's Jones Act and LHWCA claims were predicated upon three alleged acts of negligence. Stewart argues that Dutra was

negligent in: (1) causing the scow to crash suddenly into the SUPER SCOOP; (2) failing to sound a warning blast prior to moving the scow; and (3) creating an unsafe work environment by removing the protective railing around the hatch.

Dutra responded with motions for summary judgment on both counts. Ruling first on the Jones Act count, the district court concluded that because the SUPER SCOOP was not a "vessel," as that term is defined by the Jones Act, Dutra was entitled to an award of summary judgment. Stewart appealed that decision, and we affirmed, concluding that the SUPER SCOOP is not "a 'vessel in navigation' as that term has developed in the jurisprudence of the Jones Act." *Stewart v. Dutra Constr. Co.*, 230 F.3d 461, 469 (1st Cir. 2000) (*Stewart I*).

Following our decision in *Stewart I*, Dutra renewed its motion for summary judgment on the LHWCA claim. The district court granted the motion, and stated only that it was granting Dutra's motion for summary judgment based on the application of *Morehead v. Atkinson-Kiewit*, 97 F.3d 603 (1st Cir. 1996) (en banc). Stewart now appeals that decision.

II.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Rosenberg v. City of Everett*, 328 F.3d 12, 17 (1st Cir. 2003) (*citing* Fed. R. Civ. P. 56(c) (2003)). We review the district court's award of summary judgment de novo, construing the record in the light most favorable to

Stewart and resolving all reasonable inferences in his favor. *Id.*

A. "Vessel" Status

Unlike the *Stewart I* Court, we need not labor over the "vessel" status of the SUPER SCOOP or scow for purposes of the LHWCA. Although the LHWCA permits an employee to sue in negligence only in the event of an injury caused by the negligence of a vessel, 33 U.S.C. § 905(b), the LHWCA's definition of "vessel" is "significantly more inclusive than that used for evaluating seaman status under the Jones Act." *Morehead*, 97 F.3d at 607. Accordingly, Dutra has conceded that for LHWCA purposes, the SUPER SCOOP and Scow 4 are "vessels."

B. Dual Capacity Cases Under the LHWCA

The LHWCA is a comprehensive worker's compensation system which holds employers liable for compensating covered employees injured in the course of their employment, regardless of fault.[1] 33 U.S.C. § 904. The statutory no-fault compensation payments provided by the LHWCA are considered "exclusive and in place of all other liability of such employer to the employee." *Id.* § 905(a). Therefore, employees covered by the LHWCA are statutorily barred from suing their employers for injuries incurred in the course of their employment. However, while the compensation scheme is the employee's exclusive remedy regarding

[1] For a thorough history of the LHWCA, its amendments, and case law, see our en banc opinion in *Morehead*, 97 F.3d at 607-13.

his employer, the employee is still free to sue the *vessel owner* as a third party if his injury was caused by the negligence of the vessel.

Where, as here, the same entity is both employer and vessel owner, the question becomes whether the dual capacity defendant's alleged acts of negligence were committed in its capacity *qua* employer (for which it is immune from tort liability under § 905(a)) or *qua* vessel owner (for which it may be held liable under § 905(b)). *See Morehead,* 97 F.3d at 610. Though dual capacity cases are by nature complex, we fortunately proceed under the guidance of *Morehead,* which has already addressed most of the dual capacity issues raised by the appellants.

1. Morehead v. Atkinson-Kiewit

In *Morehead,* the en banc Court considered a dual capacity claim very similar to this case. Morehead was employed as a carpenter on a bridge construction project and a line-handler on a barge used for the project. *Id.* at 605. Atkinson-Kiewit ("A-K"), the construction contractor, was not only Morehead's employer, but, as charterer of the barge, was also the vessel owner. *Id.* at 606-07 (noting that under 33 U.S.C. § 902(21) bare-boat charterers such as A-K were liable as vessel owners under § 905(b)). While Morehead was handling a heavy line on the barge deck, he stepped backwards into an open hatch and was injured. The hatch had negligently been left open by a co-worker, who, like Morehead, had been hired both for carpenter and scowman duties. *Id.* at 614.

The plaintiff argued that A-K violated vessel duties owed to Morehead because at the time he was injured "A-K as vessel (rather than A-K as employer) [had] 'active

control' over the open hatch." *Id.* That is, because no construction purpose (and therefore no employment purpose) was being pursued at the time of his injury, the hatch was within A-K's control in its capacity as a vessel owner, not an employer.[2] *Id.*

We rejected this argument, and found instead that both Morehead and the employee who left the hatch open "had been hired both for carpenter and scowman duties." *Id.* We noted that both employees "were expected as part of their employment duties to lend a hand with supporting maritime chores as well as to pursue their particular construction trade." *Id.* Consequently, we agreed that A-K's "active control" over the open hatch was "therefore attributable to it as employer, not as vessel, since the hatch was opened . . . and the line thrown in the course of harbor worker duties which both men were regularly hired to perform." *Id.* Since both men were acting as employees, rather than as A-K's agent in a distinct shipowner's capacity, we found that any negligence on A-K's part was committed in its capacity *qua* employer. *Id.* at 616. As a result, Morehead's suit was barred under § 905(a). *Id.*

In reaching this conclusion, we expressly rejected any dual capacity approach that would focus on the specific

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[2] In support of this claim, Morehead emphasized that

> the barges were set alongside the pier and were not carrying construction equipment . . . . [and] A-K had instructed [the employee who left the hatch open] to open the hatch out so that A-K could exercise what Morehead argues was a vessel function – having a marine surveyor examine the barge before returning it to the owner.

Id. at 614.

activities of the employee to determine whether the employee's actions were benefitting the defendant in its capacity as vessel owner or employer at the time the employee was injured. *Id.* at 614-15. That is, we rejected any "functional" approach which would lead us to question whether an accident occurred "in furtherance of a 'construction' objective or a 'vessel' objective." *Id.* We stated:

> A "functional" interpretation, hinging the type of liability on the nature and purpose of the duties being performed by covered employees at any given time, would increase uncertainty and the frequency of disputes over the scope of the coverage. As [the two employees involved in the accidents] employment contemplated that they would alternate frequently between construction and linehandling, a single overall classification of their duties is most appropriate for determining the types of remedies available.

Id. at 615. Because the "functional" approach increased uncertainty and contravened the Congressional intent behind the LHWCA by expanding vessel owner liability, we concluded that the dual capacity vessel could be held liable under section 905(b) only to the extent that it breached its duties of care while acting in its capacity as a vessel. *Id.*

III.

Stewart makes two arguments in support of his claim that Dutra's allegedly negligent actions occurred in its capacity as vessel owner, rather than in its capacity as employer. First, Stewart claims because the scow had been taken out of service and had done no dredging work for two days prior to the accident, the work Stewart was

performing when he was injured can only be considered "vessel" work. Second, Stewart avers that Dutra remained in "actual control" of the area where he was injured because the engine and hatch area of the vessel were under the "actual control" of Timothy Angell, an independent maritime agent working distinctly on behalf of the vessel. Stewart contends that because Dutra created the negligent condition that was the proximate cause of Stewart's injuries through its agent as vessel owner, Dutra breached its vessel duties to Stewart and is liable under § 905(b). After careful consideration, we conclude that the former argument is precisely the sort of "functional" analysis precluded by *Morehead;* the latter we reject as procedurally defaulted.

A. Stewart's Functional Dual capacity Analysis

Stewart's first argument is essentially that all injuries occurring incident to repair work on a vessel implicate the defendant's capacity as a vessel owner rather than as an employer. According to Stewart, it is significant that the scow had been taken out of service and had done no dredging for two days prior to the accident. Once the crew (Stewart included) was diverted from their ordinary dredging activities to work on repair-related activities, the work they performed could only be considered "vessel" work, not "dredging" work. To support this argument, Stewart argues by analogy that "[i]f Dutra dredging company had chartered the Scow 4 from another entity, it would have returned the Scow 4 to said entity to replace the engine. A dredging contractor would not purchase a new engine in a vessel it did not own." Moreover, the Southworth Milton employee hired to repair the engine had nothing to do with the dredging operation. As a result,

Stewart maintains that the repair operations that led to his injury furthered a distinctly "vessel" objective.

This argument does not differ from the "functional" analysis rejected by the *Morehead* Court in any significant way. In *Morehead,* the plaintiff argued that the purpose of leaving the hatch open furthered the vessel's purposes, and did not further any employment purpose. Rejecting this argument, we noted that the LHWCA had been amended to "provide employees and employers with a greater degree of certainty as to the coverage in effect." *Id.* at 615. Accordingly, the legislative history of the 1984 Amendments documents the legislature's concerns about predicating coverage upon the nature of the task the employee was performing when injured:

> The situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of the injury must be avoided since such a result would be enormously destabilizing and would thus defeat one of the essential purposes of the amendments.

Id. (quoting H.R. Rep. No. 98-570(I), 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736-37).

Eschewing this approach, we noted that "as is typical in the case of harbor workers . . . [employees] were expected as part of their employment duties to lend a hand with supporting maritime chores as well as to pursue their particular construction trade." *Id.* at 614. Since both Morehead and the employee who left the hatch open were performing tasks that were contemplated by the terms of their employment, we deemed that the defendant was liable only in its capacity as employer.

Like Morehead, Stewart was performing the work he was hired to do. Although Stewart spent the majority of his time aboard the SUPER SCOOP, he, like the other employees on the SUPER SCOOP, was hired to perform tasks relating both to dredging and to occasional maintenance work on both vessels. His job contemplated performing maintenance tasks on a variety of engines and machinery related to the dredging process, including engines used for the dredging-crane, scow engines, and deck winches used for moving the dredge. He was therefore performing his regular duties as an engineer on a dredging operation.

Stewart has not cited any cases to the effect that major repair work on a vessel is inherently vessel-oriented, and not employment-oriented work. Given *Morehead*'s explicit rejection of a "functional" approach to dual capacity cases and Congress's plain intention to avoid creating uncertainty as to actions covered by the LHWCA, we are compelled to reject this argument.

B. Dutra's "Active Control" Duty

Stewart next argues that Dutra breached its vessel duties to him by remaining in active control over, and creating an unsafe condition in, the area where he was injured. This argument is based on vessel duties established by the Supreme Court in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 175-76 (1981).

In *Morehead,* we concluded that the owner of a dual capacity vessel could be held liable under § 905(b) where it breached its *Scindia* duties while acting in its capacity as vessel. *Morehead,* 97 F.3d at 615. The *Scindia* Court articulated three types of duties a vessel owner owed to

stevedoring employees. First, shipowners have a duty to turn over "the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety." *Scindia,* 451 U.S. at 167. This duty, commonly referred to as the "turnover duty," includes a duty to warn the stevedore of latent dangers that could not be discovered through the exercise of reasonable care.

Second, once stevedoring operations have begun, the vessel owner will be liable if it "actively involves itself in the cargo operations and negligently injures a longshoreman." *Id.* That is, if the vessel owner maintains active control over an area or operation, the vessel is liable for any injuries it negligently inflicts incident to the area or operation. *Id.*

Finally, a shipowner has a duty to intervene to protect stevedoring workers if it acquires actual knowledge that the vessel or equipment pose a danger and the stevedore is not exercising reasonable care to protect its employees from that risk. *Id.* at 175-76.

According to Stewart, both the area where the incident occurred and the repair activities that were taking place there were under the control of Angell, who was acting as a separate maritime agent specifically for the vessel. The presence of Angell, Stewart argues, distinguishes this case from *Morehead* because in that case, we noted that "[t]he allegedly negligent conditions (the open hatch and the absence of warnings) were not attributable to the errors of separate maritime agents acting specifically for the vessel." *Morehead,* 97 F.3d at 614. Stewart therefore contends that through Angell, Dutra as vessel owner knew or should have been aware of the danger

created by removing the protective railings around the hatch; Dutra is therefore liable in its capacity as vessel owner for its alleged breach of *Scindia*'s "active control" duty.

We decline to consider whether Dutra's actions and the presence of Angell in the engine room warrant consideration under *Scindia.* Stewart's contention that Dutra retained active control over the engine/hatch area is procedurally defaulted by his failure to raise the issue before the district court. "The law in this circuit is crystalline: a litigant's failure to explicitly raise an issue before the district court forecloses that party from raising the issue for the first time on appeal." *Boston Beer Co. Ltd. P'ship.* v. *Slesar Bros. Brewing Co.,* 9 F.3d 175, 180 (1st Cir. 1993). In the district court, Stewart's opposition to Dutra's motion for summary judgment made only passing mention of Timothy Angell, and at no point contended that he was a "separate maritime agent" whose presence distinguishes this case from *Morehead.* Indeed, the "active control" argument seems to have surfaced for the first time in Stewart's briefs to this Court.

In his briefs before the district court, Stewart refers to Angell as a "mechanic" working for "independent contractor," Southworth Milton. Nowhere does he make any other reference to the legal or employment status of Angell, nor does he otherwise discuss whether Angell exercised actual control over the scow or any portion thereof. These passing references do not amount to an argument that Angell was a separate maritime agent in actual control of the scow. *See DiMarco-Zappa v. Cabanillas,* 238 F.3d 25, 34 (1st Cir. 2001) ("Simply noting an argument in passing without explanation is insufficient to avoid waiver."); *Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir. 1985)

(appellate courts should not permit "fleeting references to preserve questions on appeal"). We therefore reject, as procedurally defaulted, Stewart's contention that Angell's activity aboard the scow distinguishes this case from *Morehead* or triggers *Escindia* liability in the form of a breach of the active control duty.

IV.

Our decision in *Morehead* compels us to find that Stewart's claim is barred by § 905(a) because he was injured while performing his regular duties as an engineer on a dredging operation. The district court's grant of summary judgment is affirmed.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 99-1487
000-1090

WILLARD STEWART,

Plaintiff, Appellant,

v.

DUTRA CONSTRUCTION COMPANY, INC.,

Defendant, Appellee.

APPEALS FROM THE UNITED
STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,

Bownes, *Senior Circuit Judge*,

and Stahl, *Circuit Judge*.

David B. Kaplan, with whom *Thomas M. Bond* and *The Kaplan / Bond Group* were on brief, for appellant.
John J. O'Connor, with whom *Frederick E. Connelly, Jr.*, and *Peabody & Arnold LLP* were on brief, for appellee.

October 31, 2000

SELYA, *Circuit Judge.* In a case reminiscent of Coleridge's storied seafarer, who was doomed to tell the same tale over and over again, *see* Samuel T. Coleridge, *Rime of the Ancient Mariner* (1798), plaintiff-appellant Willard Stewart invites us to reexamine, narrow, or distinguish our holding in *DiGiovanni* v. *Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (en banc), and declare his floating work platform – a dredge engaged in the excavation of a tunnel in the Boston Harbor – to be a "vessel in navigation" as that term is used in the jurisprudence of the Jones Act, 46 U.S.C. App. § 688. We conclude that we are bound by our en banc precedent and that, under it, the dredge in question is not a vessel in navigation within the contemplation of the Jones Act. Consequently, we affirm the district court's entry of partial summary judgment in the defendant-employer's favor.

I. BACKGROUND

We divide our depiction of the relevant background into three segments. The facts are mostly undisputed. Consistent with the conventional summary judgment praxis, we take the few controverted facts in the light most flattering to the nonmovant (here, the appellant). *See McCarthy* v. *Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

A. The Dredge.

The SUPER SCOOP is a large floating platform – its exact dimensions do not appear in the record – equipped

with a clamshell bucket. It operates as a dredge, removing silt from the ocean floor and dumping the sediment onto one of two scows that float alongside. Once the scows are full, tugboats tow them out to sea and dispose of the dredged material.

Though largely stationary, the SUPER SCOOP has navigation lights, ballast tanks, and a dining area for the crew. Crew members control the clamshell bucket by manipulating a tag-line cable attached to a counterweight. The SUPER SCOOP is incapable of self-propulsion. Crew members use anchors and cables to achieve positional movement at near-glacial speeds. The SUPER SCOOP typically moves once every two hours, covering a distance of thirty to fifty feet. Its scows also lack any means of self-propulsion. Tugboats normally are used to achieve movement. Alternatively, the dredge's crew drops a bucket from the dredge into one of the scow's hoppers; by manipulating the cables, the crew then swings the bucket so that it guides the scow around the dredge.

The SUPER SCOOP is classified as an industrial vessel, and as such, it is required to register and comply with safety regulations issued by the Coast Guard and the United States Department of Transportation. Similarly, the American Bureau of Shipping has issued a load-line certificate to the SUPER SCOOP.

B. The Incident.

Defendant-appellee Dutra Construction Company (Dutra) hired the appellant, a marine engineer, to maintain the mechanical systems of the SUPER SCOOP. Dutra purposed to use the SUPER SCOOP to help construct an immersed-tube tunnel across the Boston Harbor. The

operational plan called for floating prefabricated tube sections to the site, sinking the tubes into a previously dredged trench, and then covering the sunken tubes with backfill.

The appellant began work in late 1991. The SUPER SCOOP started to dig the cross-harbor trench needed for the tunnel. The process was long and laborious. It was still ongoing on July 15, 1993. On that date, however, the SUPER SCOOP lay idle because one of its scows (Scow No. 4) was out of commission and the other was at sea.

During this lull, the appellant boarded Scow No. 4 to effect repairs. While he was working, the SUPER SCOOP's crew proceeded to move the scow. When the scow reached its new position on the SUPER SCOOP's starboard side, the two structures collided. Dislodged by the collision, the appellant plummeted headfirst to a deck below. He sustained serious injuries.

C. The Travel of the Case.

The appellant subsequently sued Dutra in the United States District Court for the District of Massachusetts. One count of his complaint invoked the Jones Act. After a substantial period of pretrial discovery, Dutra moved for summary judgment on all counts. *See* Fed. R. Civ. P. 56. In due course, the district court, ruling *ore tenus,* denied the motion as to certain counts, but granted *brevis* disposition

on the Jones Act count. This interlocutory appeal followed.[1]

II. APPELLATE JURISDICTION

We turn briefly to the threshold issue of appellate jurisdiction. *See BIW Deceived* v. *Local S6,* 132 F.3d 824, 828 (1st Cir. 1997) (explaining that a federal court has an unflagging obligation to inquire into its own jurisdiction).

In civil cases, the usual source of appellate jurisdiction is 28 U.S.C. § 1291 (conferring appellate jurisdiction over "final decisions" of the district courts). Here, however, the order granting partial summary judgment did not dispose of all the claims asserted. Thus, this court lacks jurisdiction under section 1291. *See North Carolina Nat'l Bank* v. *Montilla,* 600 F.2d 333, 334-35 (1st Cir. 1979) (per curiam); *see generally FDIC* v. *Ogden Corp.,* 202 F.3d 454, 458-59 (1st Cir. 2000) (discussing concept of finality).

Withal, there are exceptions to the "final judgment" rule – and one such exception pertains here. Congress, in its wisdom, has enacted a special statute that permits immediate appeals from interlocutory district court orders "determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(3). Thus, an interlocutory order in an admiralty case can be appealed immediately so long as it conclusively determines the merits of a particular

[1] In fact, there are two appeals before us – but the second is from the district court's denial of a rehearing. Because it adds nothing to the dimensions of the case, we proceed as if the appellant had filed only an appeal from the entry of the order granting partial summary judgment.

claim or defense. *Martha's Vineyard Scuba Headquarters, Inc.* v. *Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1062-64 (1st Cir. 1987).

The case at hand satisfies that requirement: the district court's order determining, as a matter of law, that the SUPER SCOOP was not a vessel in navigation within the purview of the applicable Jones Act jurisprudence (and that, therefore, the appellant had no cognizable claim under that statute) plainly implicates section 1292(a)(3). Accordingly, we have jurisdiction to hear and determine this appeal.

III. THE MERITS

Having reached the merits, we first frame the issue. We then group the appellant's arguments and address them under two headings.

A. Framing the Issue.

The Jones Act provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . .

46 U.S.C. App. § 688(a). Congress enacted this legislation in 1920 to protect seamen because of their exposure to the perils of the sea. *Chandris, Inc.* v. *Latsis,* 515 U.S. 347, 354 (1995). That taxonomy seems straightforward, but it is hardly self-elucidating – and the devil is in the details. As a result, the determination of who qualifies as a seaman for this purpose has proven to be a gnarly proposition. *E.g., id.* at 356 (bemoaning that, due to definitional difficulties,

the "perils of the sea, which mariners suffer and shipowners insure against, have met their match in the perils of judicial review") (citation omitted).

Over time, the Court has untangled some of the doctrinal knots. Although the Jones Act itself does not use the word "vessel," the Court has placed a gloss on the statute. This gloss clarifies that a prospective plaintiff's status as a seaman (and, therefore, his eligibility to sue under the Jones Act) depends, in the first instance, on his connection to a "vessel in navigation." *McDermott Int'l, Inc.* v. *Wilander,* 498 U.S. 337, 354 (1991). But the Justices have spoken rather elliptically as to the nature of that connection, *e.g., Chandris,* 515 U.S. at 368-71; *Wilander,* 498 U.S. at 354-57, and they have left the lower courts to fret, largely unguided, over what is – or is not – a vessel in navigation. That question is of utmost importance here, as Dutra acknowledges the appellant's status as a member of the SUPER SCOOP's crew. The pivotal issue, then, is whether the SUPER SCOOP, at the time of the accident, was a vessel in navigation as that term is used in the jurisprudence of the Jones Act.

In many cases, the deceptively simple question of whether a particular floating object is a vessel in navigation reduces to a question of fact. *See Chandris,* 515 U.S. at 373. But when the facts and the reasonable inferences extractable therefrom, viewed in the light most congenial to the injured worker, bring a particular structure outside any permissible understanding of the term, the court may determine the status of the structure as a matter of law. *See Tonnesen* v. *Yonkers Contracting Co.,* 82 F.3d 30, 33 (2d Cir. 1996); *Bennett* v. *Perini Corp.,* 510 F.2d 114, 116 (1st Cir. 1975). Believing that this case came within that class of cases, the court below opted to decide the issue. And, it

concluded that the dredge was not a vessel in navigation. We review its determination de novo. *See Garside* v. *Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990).

B. Stare Decisis.

In attempting to convince us that the district court erred in not deeming the SUPER SCOOP a vessel in navigation for Jones Act purposes, the appellant runs headlong into controlling precedent. Eight years ago, this court, sitting en banc, confronted a case in which a plaintiff had sustained injuries while working aboard the barge BETTY F. We described the barge as follows:

> The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Jamestown, Rhode Island, bridge, bearing a crane that was being used for bridge construction. . . . It had been at the Jamestown bridge for a month. It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.

DiGiovanni, 959 F.2d at 1120-21.

DiGiovanni, whose main responsibility was to handle a tag-line to guide the crane, slipped and fell while standing on the deck of an appurtenant supply barge (which served as a work platform). *Id.* at 1121. He attempted to sue under various theories. We rejected his Jones Act

claim on the basis that the BETTY F was not a vessel in navigation. *Id.* at 1124. We held squarely that "if a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen [for Jones Act purposes] only when it is in actual navigation or transit." *Id.* at 1123 (quoting *Bernard* v. *Binnings Constr. Co.*, 741 F.2d 824, 829 (5th Cir. 1984)).

The appellant exhorts us to scuttle the holding of *DiGiovanni,* denouncing the standard it embodies as impractical, unwise, and inconsistent with the decisions of other courts (including the Fifth Circuit). But our precedent-based system of justice places a premium on finality, stability, and certainty in the law, particularly in the field of statutory construction. *See Hubbard* v. *United States,* 514 U.S. 695, 711 (1995). Thus, the principle of *stare decisis* – the doctrine that "renders the ruling of *law* in a case binding in future cases before the same court or other courts owing obedience to the decision," *Gately v. Massachusetts,* 2 F.3d 1221, 1226 (1st Cir. 1993) – is an integral component of our jurisprudence. This principle, fairly applied, demands our allegiance to *DiGiovanni.*

We do not pledge this allegiance blindly. We recognize that "*stare decisis* is neither a straightjacket nor an immutable rule." *Carpenters Local Union No. 26* v. *United States Fid. & Guar. Co.,* 215 F.3d 136, 142 (1st Cir. 2000). Nevertheless, a departure from a court's own precedent, in the teeth of the principle of *stare decisis,* must be supported by some "special justification." *Dickerson* v. *United States,* 120 S.Ct. 2326, 2336 (2000). For example, prior

circuit precedent will yield to a contrary decision of the Supreme Court or to a statutory overruling. *Williams* v. *Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995).[2] Here, however, no subsequent opinion of the Supreme Court has cast doubt on *DiGiovanni,* nor has the Jones Act been amended in any relevant respect. Consequently, no "special justification" exists to support a deviation from circuit precedent.

In *Williams,* we also noted that on rare occasions a circuit precedent, though not directly overruled or superseded, nonetheless might crumble in the face of compelling authority. *See id.* We speculated that this might occur, say, when persuasive case law postdating "the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." *Id.* We are dubious that this scenario can ever play out where, as here, a panel of a court finds its path blocked by an earlier decision of the full court. *Cf. Ewing* v. *Williams,* 596 F.2d 391, 397 (9th Cir. 1979) (declaring that "an appellate panel simply cannot modify an *en banc* decision"). A contrary rule – permitting a single panel in a multi-panel circuit to revisit determinations made by the court as a whole – would invite chaos. For that reason, panels generally are precluded from following such a maverick course. *E.g., United States* v. *Norton,* 780 F.2d 21, 23 (8th Cir. 1985); *United States* v. *Poolaw,* 588 F.2d

[2] In *Williams,* we also spoke of a subsequent decision of the court itself, sitting en banc. 45 F.3d at 592. That justification does not apply here; *DiGiovanni* is an en banc opinion, and the full court has not repudiated it.

103, 105 (5th Cir. 1979); *cf. Biggins* v. *Hazen Paper Co.,* 111 F.3d 205, 208 (1st Cir. 1997) (holding that a panel may not reconsider issues decided earlier in the same case by the en banc court).

In this case, all roads lead to Rome. *DiGiovanni* has not been overruled by a higher authority and remains good law. Even if we assume, for argument's sake, that in some extraordinary circumstance a panel might be warranted in declaring an earlier en banc decision obsolete and refusing to follow it, the appellant has offered no adequate justification for applying such a long-odds exception here. We hold, therefore, that we are bound by *DiGiovanni.*

C. Other Arguments.

The appellant's remaining arguments take a different tack. He posits that, even under *DiGiovanni,* the SUPER SCOOP qualifies as a vessel in navigation. This argument depends, in the last analysis, on the appellant's ability to distinguish the SUPER SCOOP from its *DiGiovanni* counterpart, the BETTY F. Like the district court, we are unable to discern a meaningful distinction.

To begin with, the appellant claims that the *DiGiovanni* standard does not apply to the SUPER SCOOP at all because that standard only applies to "barges or other floats." *DiGiovanni,* 959 F.2d at 1123. He then brings to bear a potpourri of other criteria, citing, on the one hand, to formulations drawn from statutes (other than the Jones Act), Coast Guard classifications, and encyclopedia definitions, and, on the other hand, to the SUPER SCOOP's appurtenances (such as ballast tanks, navigational lights, and the like). These attributes, he says, show that the SUPER SCOOP is a vessel in navigation. This attempt to maneuver around *DiGiovanni* quickly runs aground.

In the first place, when the *DiGiovanni* court spoke of "floats," that word was meant to encompass a wide variety of objects. Surely, a dredge falls within its sweep. To read *DiGiovanni* more narrowly, as the appellant urges, would strip the en banc court's holding of all practical meaning.

In the second place, the term "vessel in navigation," as it has been employed in the Jones Act context, is a term of art. Jones Act recovery hinges not on the physical characteristics of a structure or on how others might view it, but, rather, on the structure's function and use. Thus, in *DiGiovanni,* the court refused to place decretory significance on maritime classifications or equipage. *See id.* Indeed, the *DiGiovanni* dissent made exactly the same sort of plea that the appellant makes here, *see id.* at 1124-25 (Torruella, J., dissenting), and the full court nonetheless held the BETTY F not to be a vessel in navigation for Jones Act purposes.[3] Consistent with that approach, we conclude that a dredge like the SUPER SCOOP comes within the compass of this court's holding in *DiGiovanni.*

The appellant next notes that, according to the *DiGiovanni* court, a barge or float may be considered a Jones Act vessel if "its purpose or primary business" is navigation or commerce. *Id.* at 1123. Seizing on this statement, he alleges that the SUPER SCOOP qualifies under this rubric. In his view, dredging itself is a form of navigation

[3] Like the SUPER SCOOP, the BETTY F possessed "the commonly understood characteristics of a vessel"; for instance, it was registered with the Coast Guard, obliged to comply with various safety regulations applicable to ships, and had navigation lights, ballast tanks, and the like. *See DiGiovanni,* 959 F.2d at 1120. We could continue, but the point is readily evident.

and transportation: to dredge, the SUPER SCOOP must transport the clamshell bucket and associated equipment across the harbor, and must cause the dredged material to be carried out to sea. He notes, too, that the SUPER SCOOP was situated in the harbor at the time of the accident, had a captain and a crew (but no shoreside employees), and carried navigational equipment.

This construct distorts the functional analysis that we endorsed in *DiGiovanni.* That analysis focuses on *primary* functions and, at bottom, dredging is primarily a form of construction. Any navigation or transportation that may be required is incidental to this primary function. In this respect, the only real distinction between the SUPER SCOOP and the BETTY F is that the former was being used in the construction of a cross-harbor tunnel while the latter was being used in the construction of an over-the-bay bridge. It does not help the appellant that both structures were moved with some regularity across navigable waters; even regular movement of a floating structure across navigable waters will not transform that structure into a vessel when that motion is incidental to the central purpose served by the structure. *See Bernard,* 741 F.2d at 830-31. Because both the SUPER SCOOP and the BETTY F were floating stages used primarily as extensions of the land for the purpose of securing heavy equipment to construct a passage across the sea, neither is a vessel in navigation within the jurisprudence of the Jones Act. *See Powers* v. *Bethlehem Steel Corp.,* 477 F.2d 643, 646 (1st Cir. 1973).

The appellant has one last fallback position. He maintains that even if the SUPER SCOOP was not a vessel in navigation, Scow No. 4 – the structure on which he was working when the accident occurred – was a vessel

in navigation because it was actually in transit at that time. Building on this foundation, he argues that since Scow No. 4 was part of the SUPER SCOOP's flotilla, liability under the Jones Act should attach.

This argument, too, is targeted at an exception to the rule laid down in *DiGiovanni.* There, we recognized that, even if a floating structure's primary purpose was not navigational, workers nonetheless might be considered seamen within the contemplation of the Jones Act if the structure "is in actual navigation or transit" at the time an injury occurred. *DiGiovanni,* 959 F.2d at 1123. The facts of this case, however, do not bring the appellant within the contours of this exception.

First and foremost, the appellant's status as a seaman depends upon the movement *vel non* of the SUPER SCOOP, not the incidental positioning of an appurtenant scow. The determinative factor in this equation is that the appellant was assigned permanently to (i.e., was part of the crew of) the SUPER SCOOP, not Scow No. 4. *See Bennett,* 510 F.2d at 116-17. And by his own admission, the SUPER SCOOP was not in motion when the accident occurred. Thus, the fact that the scow was being moved is irrelevant. *See DiGiovanni,* 959 F.2d at 1124 (holding that the plaintiff's location on the supply barge at the time of the accident did not alter his status). The *DiGiovanni* exception does not obtain.

In an effort to sail around this obstacle, the appellant asseverates that we should attach significance to Scow No. 4's movement at the time of the accident because the scow was a part of the SUPER SCOOP's flotilla. This asseveration misconstrues Supreme Court precedent. The Court has held that a plaintiff's relationship to a fleet of vessels,

rather than to a particular ship, can establish the *connection* needed to confer seaman status. *Harbor Tug & Barge Co.* v. *Papai,* 520 U.S. 548, 555-57 (1997); *Chandris,* 515 U.S. at 368. Here, however, the connection element is not in issue (Dutra has conceded the point). The common ownership of the dredge and scow has no probative force on the subjacent issue: whether the floating work station was – or was not – a vessel in navigation for Jones Act purposes. *See DiGiovanni,* 959 F.2d at 1124.

IV. CONCLUSION

We need go no further. Given the on-point precedent established by the en banc court less than a decade ago and the absence of any trialworthy issue of material fact, the SUPER SCOOP is not a "vessel in navigation" as that term has developed in the jurisprudence of the Jones Act. Consequently, the lower court appropriately jettisoned the Jones Act count.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff v. DUTRA CONSTRUCTION CO., INC. Defendant	CIVIL ACTION NO. 95-11046-RCL

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S MOTION FOR RENEWED SUMMARY JUDGMENT ON ALL REMAINING COUNTS

(Filed Nov. 5, 2001)

This case arises out of an accident that occurred on July 15, 1993. The plaintiff was employed by Dutra Construction Co., Inc. ("Dutra") as an engineer assigned to the dredge Superscoop, owned and operated by Dutra. Dutra was hired to dredge Boston Harbor for the laying of the third harbor tunnel. The plaintiff alleges that he was injured when he fell through an open hatch while on dump Scow #4 which was being maneuvered along side the Superscoop.

On October 17, 1996 the defendant filed Defendant, Dutra Construction Co., Inc.'s Supplemental Motion for Summary Judgment. That Motion addressed the recently added count in plaintiff's Amended Complaint brought pursuant to Section 905(b) of the Longshore & Harbor Workers' Compensation Act. Because of bankruptcy proceedings the case was dismissed without prejudice for

two years. The Motions for Summary Judgment were finally heard on March 29, 1999. At the hearing the Court denied the defendant's request for summary judgment on the Section 905(b) count even though plaintiff's counsel stated to the Court . . . "I am not really – the 905 argument is just – was just a fallback position. I am not really opposing

* * *

[5/21/02 Motion allowed based on an application of *Morehead v Atkinson – Kiewit*, 97 F.3d 603 (1st Cir. 1996) to the undisputed facts of record in this case. /s/ Reginald C. Lindsay]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLARD STEWART
Plaintiff

CIVIL ACTION

V.

No. *95-11046-RCL*

DUTRA CONSTRUCTION CO., INC.
Defendant

JUDGMENT

LINDSAY, D. J.

In accordance with the Court's Order dated *May 21, 2002* granting defendant's motion for summary judgment in the above-entitled action, it is hereby ORDERED:

Judgment for the *defendant Dutra Construction Co., Inc. on all counts*

By the Court,

May 21, 2002
Date

/s/ Lisa M. Hourihan
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT FOR
DISTRICT OF MASSACHUSETTS

Civil Action No. 95-11046

****

WILLARD STEWART

vs.

DUTRA CONSTRUCTION COMPANY, INC.

****

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE REGINALD C. LINDSAY
UNITED STATES DISTRICT JUDGE

Courtroom 11, 5th floor
Courthouse Way
Boston, Massachusetts 02210
Date: March 29, 1999

APPEARANCES:

Marvin Barish, Esq., and Greg Nester, Esq., on behalf of the plaintiff.
Frederick Connelly, Esq., on behalf of the defendant.

TERI CELESTE GIBSON,
OFFICIAL COURT REPORTER
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Mechanical Stenography; computer aided transcription.

[2] P-R-O-C-E-E-D-I-N-G-S

THE CLERK: All rise. Court is in session. Please be seated.

This is a Civil Action Number 95-11046.

Would counsel identify themselves.

MR. CONNELLY: Frederick Connelly. Moving party to the defendant, Your Honor.

THE COURT: Mr. Connelly.

MR. CONNELLY: Yes, Your Honor.

THE COURT: Okay.

MR. BARISH: Marvin Barish representing the plaintiff, Your Honor.

THE COURT: Okay

MR. NESTER: And I am Gregory Nester, also here for the plaintiff, Your Honor.

THE COURT: Nester?

MR. NESTER: Nester, correct.

THE COURT: Mr. Connolly [sic].

MR. CONNELLY: Thank you, Your Honor.

Your Honor, this is the –

THE COURT: Tell me this before you start, one thing isn't clear to me from the record, and I will let you tell me. Where is it, where did Mr. Stewart get injured? Was he injured on this scow? Did he fall in a hole on the scow or on the SUPER SCOOP?

[3] MR. CONNELLY: He was actually on the scow, was drawn next to and then tied up to.

THE COURT: He was on the other – on the boat?

MR. CONNELLY: He was on the scow.

THE COURT: Or on the boat, the scow. There is no disagreement about the scow, is there?

MR. CONNELLY: As far as what, Your Honor?

THE COURT: A vessel.

MR. CONNELLY: As far as the scow being a vessel, really don't – I haven't researched that, Your Honor, whether that would be considered a vessel. Also, it does not have any self-propulsion. It must be towed by a tug boat out to sea.

THE COURT: This isn't one of those scows that bring people back and forth to the SUPER SCOOP?

MR. CONNELLY: It's called a dump scow, Your Honor. 90 percent of it is just a big bucket that opens up at sea and drops the dredge material out. The engine on it that he was working on was on an engine to propel it. It was an engine that opened the bottom of the scow.

THE COURT: It's not an injury from the scow itself?

MR. CONNELLY: Correct, Your Honor. It's on the scow itself, but it's not to propel the scow.

THE COURT: Okay. Go ahead.

[4] MR. CONNELLY: Your Honor, my first point I want to raise is that this motion for summary judgement was filed back in 1996.

THE COURT: Yes, I know.

MR. CONNELLY: After I filed it, the plaintiff amended their complain [sic] to add a count under Chapter 905B. I amended the motion as well to cover that. Friday, I was not in the office, but Friday I was hand delivered a supplemental memo in opposition. I believe that is quite untimely. It was written –

THE COURT: Was there permission granted to file such a supplemental memorandum given?

MR. BARISH: Your Honor, I don't believe there was permission granted. It just seemed that three years there, it would bring the court up-to-date.

THE COURT: I recognize three years is a long time. I am not sure, I think this motion was terminated during some period of time.

MR. CONNELLY: Yes.

MR. BARISH: By bankruptcy.

MR. CONNELLY: Yes, a year and a half, due to bankruptcy.

THE COURT: But –

MR. BARISH: I have no permission to do it, Your Honor.

[5] THE COURT: Okay. I am not sure whether I should consider it.

MR. BARISH: I thought it would be helpful.

THE COURT: I think it might have been helpful, but I think you are – so you have to get leave to file such a motion.

MR. BARISH: Yes, sir. I think I can say what – I think I can argue the same things.

MR. CONNELLY: I appreciate it, Your Honor. Again, this was first going to be heard in December of this year, and at the request of plaintiff's counsel, it was continued until today, so there was ample time.

THE COURT: Not only that, many of the cases that you cited, I did look at it, many of the cases you cite are cases that go back to 1980. There was one new case, a 1998 case.

MR. BARISH: The only purpose of this memo, Your Honor, was to deal with Mr. Connolly's [sic] statement that DiGiovanni is accepted everywhere and most likely authority. I want to point out it was inaccurate. The case he relied on was overturned.

THE COURT: I suppose I don't want to get you too far off the track. Even if it's not the enlightened authority, maybe it's the authority in the First Circuit, [6] and even if it is unenlightened, I am bound by it.

MR. BARISH: Well, Your Honor –

THE COURT: That is the law in the First Circuit.

MR. BARISH: I don't want to jump ahead. It's just that DiGiovanni has nothing to do with the facts in

this case and should not be extended. I am not arguing that DiGiovanni is bad law.

THE COURT: Okay. Right. Let me let Mr. Mr. Connelly go on.

MR. CONNELLY: Thank you, Your Honor.

Your Honor, that is in fact the main argument today for the defendants is that DiGiovanni is applicable to this case, and it is the law in the First Circuit. In their first brief and in their latter brief, there has been no cases cited, certainly from the First circuit that overturned DiGiovanni, and there is no cases from the Supreme Court that overturned DiGiovanni.

THE COURT: DiGiovanni has been – don't you think . . . case limits DiGiovanni at least to the extent that DiGiovanni says that what you do is to determine whether the vessel was in navigation at the time; that is no longer the law. DiGiovanni says that you find out what the – whether the vessel is a – whether the instrument is a vessel depends on a party's purpose, and so on appearance and purpose and so on or whether it was in navigation at the [7] time.

Now, to the extent that it has that provision, navigation at the time, don't you think it's been at least implicitly overruled by Chandris that says you don't take that snapshot. That may not have anything to do with this case.

MR. CONNELLY: That's as far as this case is concerned, that Chandris' decision does not affect the DiGiovanni at all as far as –

THE COURT: Because that is not part of this case, but you are saying it's still good law, and I wonder whether it's good law in every aspect of the case, but it may not have anything to do with this case.

MR. CONNELLY: We think it is still good law, and the law of the First Circuit as far as determining whether or not the SUPER SCOOP which is the plaintiff's allegation that he was assigned to the SUPER SCOOP, that is the vessel he alleges he was assigned to.

THE COURT: On that basis, let's talk about this case as opposed to DiGiovanni. DiGiovanni was something attached to a bridge, was it not, the instrument or the thing, I don't want to use a word, because the only word I can think of is vessel, but the instrument was attached to a bridge.

This SUPER SCOOP moves five or six times a day, [8] doesn't it?

MR. CONNELLY: Yes, and so does the barge. We can call it in DiGiovanni. It moved actually more times a day than did the SUPER SCOOP. It moved along the bridge. It also had no means of self-propulsion, neither did the –

THE COURT: This moves along the water?

MR. CONNELLY: It moves along the water, yes. It's dredging as opposed to working on the bridge. The DiGiovanni vessel, I think it's the BETTY F.

THE COURT: Yes. It doesn't matter.

MR. CONNELLY: Was moved along, and it can be moved along by it's anchor as well. The SUPER SCOOP

can also be moved along short distances by it's anchors, you know, drawing in on one side and pulling on the other.

Same type of movement moving along instead of working on a bridge and moving along that way, it was moving along and dredging it, but for the purposes that we believe that for the argument here today, Your Honor, that the difference between building a bridge for cars and building a tunnel of cars is really no difference.

THE COURT: Wasn't BETTY F actually attached to the bridge itself?

MR. CONNELLY: It would attach itself, I believe, Your Honor, my reading the case, it attached itself just when it was working on it at that point and then move on and [9] then unattached and then move on.

THE COURT: Does distance it can move make a difference, after all, the Super Scoop can move all over the harbor.

MR. CONNELLY: Well, the DiGiovanni vessel can as well, Your Honor, it was towed quite a distance to get to that site and towed back again. In fact, the DiGiovanni vessel would be towed more accurately, would be towed in more in the evening to the shore than the vessel, than the SUPER SCOOP.

THE COURT: I am not talking so much as the towing, the moving along the navigation during the course of the day or moving during the course of the day.

MR. CONNELLY: In both situations, they would move by their anchors or if they want to move a longer distance, if they want to, it would be by a tow, but

the SUPER SCOOPER moves a very short distance during the day, Your Honor.

THE COURT: Where was it moving for.

MR. CONNELLY: Dredging, simply to dredge, as they dug the Fred [sic] Williams tunnel, if it moved about 30 feet at times, six times a day, roughly, and this over a 24-hour period. It was going on 24 hours, so in a 24-hour period, it would move about six times, all depending on what they are digging. If they hit rock, they would move less easily. If the muck is coming up nice and easy, they might move a [10] little bit more. It was gradual movements as they are digging the harbor tunnel, dredging. The Super Scooper [sic] has a permanently affixed crane. There was also a crane on the BETTY F in DiGiovanni.

Again, both had to be towed to move long distances. Mr – as we have already mentioned, Mr. Stewart was injured when he was working on the scow, helping someone to work on the engine. He was doing some electrical wiring. It was – the scow was brought in a little closer to the SUPER SCOOP. It was – if must have been bumped. He lost his balance and fell through the hatch.

My brother will argue that seaman status is generally viewed as a mixed question of law. In fact, the summary judge – the summary judgement motion, Your Honor, is appropriate under several cases, including McDermott and Chandris, both Supreme Court cases. The facts in now will reasonably support one conclusion, and it's the defendant's position that there is only one reasonable conclusion in this case.

THE COURT: And why is that?

MR. CONNELLY: Why is there only one reasonable conclusion in this case, Your Honor?

THE COURT: Yes.

MR. CONNELLY: Because I believe because of the similarity, and the facts between this case and the [11] DiGiovanni case, that like the DiGiovanni court, this court should decide as an matter of law that this is not a vessel. That it is a work platform that he was working on and not a vessel. He is not entitled to the special protections given to a Jones Act seaman.

THE COURT: Navigational aids on the SUPER SCOOP.

MR. CONNELLY: They were navigational lights. I believe both the –

THE COURT: What is the significance of the crew wearing life jackets, if any?

MR. CONNELLY: I believe they –

THE COURT: They wear life jackets on the SUPER SCOOP, don't they?

MR. CONNELLY: Your Honor, I think if this was tied up to the shore and they were out in six feet of water, they would be wearing life jackets.

THE COURT: No significance.

MR. CONNELLY: No significance, according to the lower cases. I don't know whether off hand whether DiGiovanni was mentioned by the court because I don't think that is significant.

THE COURT: All right. So you say it has no means of – it moves the same way by cables and anchors. Has no – has only navigational lights and no other navigational aids?

[12] MR. CONNELLY: Right. It has nautical equipment, so does the BETTY F in DiGiovanni. It's inspected by the coast guard, but so was the barge in DiGiovanni.

Both as I mentioned before were barges bearing crane and both had to be towed to the site by tugboat over a period. I am not sure whether the DiGiovanni barge had a bow or not, which helps it being towed, but both had to be towed long distances and were.

THE COURT: The Super Scoop has a rig bow?

MR. CONNELLY: Yes.

THE COURT: The issue though is in this case is – the only issue here is whether the Super Scoop [sic] is a vessel; there is no –

MR. CONNELLY: Right.

THE COURT: – there is no real issue about whether Mr. Stewart's connection with the vessel –

MR. CONNELLY: No. And then I don't need to argue that in any detail. My brother in both briefs cites cases discussing that issue which isn't really an issue at all in this case. There is no – we are not claiming that he wasn't tied to the SUPER SCOOP, whether the vessel is the issue.

Under DiGiovanni, the rule is if a barge or other float's purpose or primary business is not navigation or

commerce, then the work is assigned thereto for its short [13] enterprise ought to be considered seaman only when it's actual navigation or transit.

THE COURT: That is the part I think has been overruled by the Supreme Court but that –

MR. CONNELLY: That's the second part, but the primary purpose, Your Honor, of this – I don't think this really can be argued. The primary purpose is not navigation or commerce. The primary purpose even though my brother argued it had to be brought in with the crane on it so it would – that argument is that it was bringing equipment in, the crane, although it's permanently attached.

The primary purpose is dredging; that is all this SUPER SCOOP is used for. The primary purpose is not navigation or commerce. It's simply dredging.

THE COURT: What is the crane for?

MR. CONNELLY: That crane is only for dredging. It has a bucket attached to it, and its only purpose for this crane as far as I know in the Super Scoop is never used for anything else like –

THE COURT: You say it has a crane on it and, therefore, it's like the BETTY F in the DiGiovanni case in the sense that the mere fact that it was brought to – it bought this crane out to the bridging site as you would say, an incidental to its purpose?

MR. CONNELLY: Yes, Your Honor, correct.

[14] THE COURT: So the mere fact that it hauled that crane you say has no – it makes –

MR. CONNELLY: As it happens the SUPER SCOOP was built – when it was built, the crane was built on it, and it never has been removed from it, so it's part.

THE COURT: You say it's not – you say it's not even equipment. It's really part of the Super Scoop itself?

MR. CONNELLY: Yes, Your Honor, even if you decided that it was equipment which I believe my brother might argue that is incidental compared to the primary business.

THE COURT: Do they bring people out there on the SUPER SCOOP?

MR. CONNELLY: When it's being towed, no people can be on board. They have to bring people out by boat to get to it.

THE COURT: And they come out on those work boats, scows?

MR. CONNELLY: Right. Referred to as work boats so we don't get them confused with the scows which when they talk about scows in this case, this job, it's the scows, they bring materials about 5 miles out to dump.

THE COURT: So any other equipment on the SUPER SCOOP, other than the crane?

MR. CONNELLY: The crane is – takes up most of [15] it. There are some lights. There are the wrench engines that drive the anchors. There is no place to sleep, but this is a place to get like a – they call it a tub to get some coffee and things of that nature, and – but there is no place to sleep. There is no quarters for bunking. There is no shower facility on board.

THE COURT: Bathroom?

MR. CONNELLY: There is a bathroom. There would be a bathroom. I don't know comparing that to the barge in DiGiovanni, whether there is a bathroom on that as well.

THE COURT: Okay.

MR. CONNELLY: Give me one second, Your Honor.

The DiGiovanni court argued that the movement of the Barge about the pier and they did talk about the movement because it did have to be moved or working convenience was hardly navigation or commerce. I think the court would decide that the movement, the slight movement on – for dredging purposes, the SUPER SCOOP was again, hardly navigation or commerce.

The DiGiovanni court ruled that in all respects, it met the commonly understood characteristics of the vessel, the BETTY F, but held that it was not a vessel for purposes of the Jones Act, and as a matter of law, is entitled to – the plaintiff in that case was entitled to no Jones Act recovery.

[16] Now, my brother mentioned that the court – I had cited a case Tonnesen versus Yonkers, Eastern District of New York, where they adopted DiGiovanni; that has been overturned. I had cited another case Hatch which is a Six [sic] Circuit case, and that case hasn't been overturned. My brother mentioned that the Hatch case involved not a barge, but something more akin to a dry dock. Looking at the Hatch case, this is the Sixth Circuit, fairly recent.

THE COURT: I am not sure all that matters. If DiGiovanni is good law in the First Circuit and you say

this case is controlled by DiGiovanni, that is as far as I need to look; isn't that right?

MR. CONNELLY: Yes, Your Honor, that is true, and that would be our argument as well. I was anticipating my brother citing cases that are saying that DiGiovanni is not good law. We are not going to follow it and realize he was going to do that because I cited cases saying other circuits are starting to follow it, but the truth of the matter is that the First Circuit – that is the law in the First Circuit, and it has not been changed, and it was cited, DiGiovanni was cited by the U.S. Supreme Court and pretty much left it alone. They didn't overrule it for the principles that we believe guide today.

THE COURT: How about the Long Shore Act?

MR. CONNELLY: The Long Shore Act, Your Honor, in [17] this case, again, the defendants are relying on one case really, so it makes the argument a little easier. In the Jones Act, you rely on DiGiovanni, The Long Shore, we rely on another recent First Circuit case, Morehead versus Atkinson-Kiewit, a 1996 case. Dutra simply is subject to suit in its capacity as vessel owner to that situation.

THE COURT: Let me see if I can get to the heart of where it seems to be the issue as far as all concerned in this case. Mr. Stewart says there is a missing railing on this thing –

MR. CONNELLY: Yes.

THE COURT: – the scow I guess it is now. And he fell – one of the reasons he fell was because of the missing railing. Doesn't that create an issue of fact having to do with whether the ship as it was turned over from the

vessel owner to the employer, was in appropriate and safe condition?

MR. CONNELLY: That might, Your Honor, given the time frame, also, the evidence would be they removed that railing to get – to take the hatch out, to get the engine down below.

THE COURT: Is that the evidence before me now though? Now right – that may be the evidence at trial, but I mean at the moment the state of the record is such that I don't know how that railing got to be moved.

[18] MR. CONNELLY: I don't know, Your Honor, whether I addressed that in the facts.

THE COURT: I don't remember seeing you addressing the railing, but don't we have an issue of fact about maybe you can resolve it quickly at trial, but maybe there is an issue of fact about the railing and the condition of the scow when the thing was turned over?

MR. CONNELLY: I didn't know that was an issue, Your Honor. You raised that issue.

THE COURT: The plaintiff says that is what happened, that one of the reasons he fell in is because it wasn't a railing there.

MR. CONNELLY: Yes, Your Honor, but there has been no issue to when the railing was taken out of why it wasn't there.

THE COURT: Except that is an issue, that is an issue it seems to me that is implicit in the Morehead case when the Morehead has this – the Morehead calls this a schizophrenia between the vessel as vessel – between the

vessel, owner of the vessel, the employer – when an employer is two people, the employer is an employer, and the employer is also the vessel owner, one of the issues is the condition of the vessel at the time it is turned over, and so it seems to me the railing is an issue or it's not only an issue at the time it is turned over, it's whether the [19] Morehead says that the owner may also have some duty if the owner is still controlling some part of the vessel qui omne (phonetic), so that the missing railing seems to be an issue both in terms of – both of the turnover and in terms of who controls that part of the scow, don't you think?

MR. CONNELLY: Well, Your Honor, I don't think there is any evidence my brother has of any evidence as to when the railing was taken out as far as when it was – what the condition was when it was turned over. All we know is that at the time, it's definitely an issue of fact in dispute as to whether or not the railing was there at the time that he fail [sic]. As far as –

THE COURT: Is there an issue of dispute whether it was there or not there?

MR. CONNELLY: Yes, Your Honor.

THE COURT: Okay.

MR. CONNELLY: But as far as comparing to the Morehead case, the same argument we made with whether or not this hatch was opened when the ship was turned over, the hatch was opened for a long period of time according to the facts in the Morehead case, and had been left open because they expected somebody to come aboard.

THE COURT: I don't have any of that; I don't have those facts before me. I don't have how long the railing was opened, how obvious it was at that time the

railing was [20] open. I mean I simply don't know what the – whether the railing was open at the time the ship was turned over or whether Dutra controlled that part of the ship as owner or not. I guess I just don't have that.

The defendant's –

MR. CONNELLY: Well, Your Honor, the defendant's argument is that the control they had over that area, be it the hatch, be it the railing, and it was as employer and not as vessel owner.

MR. BARISH: Similar to the facts in the Morehead case, they were going to – down below to work on the engine for the scow. He was – his job is similar to the plaintiff in Morehead, had various roles. One of them was mainly to grease everything on the ship much of which was engines, had nothing to do with moving the SUPER SCOOP, and there were no engines that he could work on that could help move the scow. The only thing he was working on in that time was that engine which opened and shut it, a simple – a part of the dredging operation.

In the Morehead case, they discussed vessel ownership versus basically construction company owner or employer as construction company, and in our case we don't have a construction company. We have dredging operation versus vessel owner. This scow had been under their control for a period of time, Your Honor. There is no, I don't [21] think, issue as far as that is concerned, and they had decided they needed to work on that engine to get it working again and the condition on the engine and the means of getting to that engine were part of the dredging operation, had nothing to do with the movement of navigational movement of the scow or of the SUPER SCOOP for that purpose.

So again, Your Honor, we think it's almost identical to the facts of the Morehead case, whether or not it was just the – if it was caused because the hatch was open or it was caused because the railing wasn't there. The issue is the same, is that they removed it. If they didn't take that railing out as employer, as dredging company.

THE COURT: That seems to be the issue, whether – who moved it and when it was moved seems to be the issue.

MR. CONNELLY: Well, there is no – and I believe this was argued in a similar case to the Morehead case, people hired to work on the SUPER SCOOP. There was not a separate crew.

THE COURT: I understand that.

MR. CONNELLY: Everyone there was engaged in dredging, and they had some duties, you know, to move the SUPER SCOOP, 16, 30 feet, six times a day, but their main purpose was dredging and the only purpose of this engine, and of course the means to get to the engine which may have caused this accident, was dredging.

[22] THE COURT: Okay. All right.

MR. CONNELLY: Thank you.

THE COURT: Thank you sir.

All right, sir.

MR. BARISH: Yes. If I may, Your Honor.

THE COURT: Why don't you start where he left off if you wouldn't mind.

MR. BARISH: You mean with the –

THE COURT: Yes.

MR. BARISH: That is clearly a question of fact for a jury. The problem with his argument is that Dutra was always in control of this vessel, so that anything that happened under the ship owner's watch –

THE COURT: Why do you say that? Dutra was also the employer of these folks.

MR. BARISH: Yes, but the problem – the problem is that the question of fact that the court raised, namely when the railing was removed, is a significant one, and it's our position that it was removed prior to this man's going onto the scow.

THE COURT: If it were removed prior to his going onto the scow and it was always removed, then it becomes pretty obvious that it is not there.

MR. BARISH: Yes.

THE COURT: And it's pretty obvious. Why isn't [23] that the employer?

MR. BARISH: That is why we are getting into the factual problem now because it was not always removed. It was removed shortly before he went onto the scow. But I am not really, Your Honor, if I may, I am not really – the 905 argument is just – was just a fallback position. I am not really opposing their motion for summary judgement on that basis.

THE COURT: Well, it may be. I wouldn't give it up.

MR. BARISH: I am not.

THE COURT: I haven't decided the seaman question.

MR. BARISH: I am not giving it up but, Your Honor, if I may, I think these facts so clearly create an issue of fact for the jury, quite frankly, I guess I am getting carried away, but I think I have a better shot at getting summary judgement on the seaman issue than he does.

THE COURT: Well, tell me how you think that.

MR. BARISH: Well, I think that because there is no question as he admits that my client spent 99 percent of his time aboard the dredge, which happens to be a vessel.

THE COURT: He says that is not an issue in the case.

MR. BARISH: Right.

THE COURT: He says the only issue in the case is [24] whether that dredge –

MR. BARISH: Dredge –

THE COURT: – is a vessel.

MR. BARISH: That is simple, Your Honor. The difference between a work platform which DiGiovanni ruled that that particular setup was and a vessel is that the vessel plies on navigable water which this one did, that it carries crew and machinery which this one did.

THE COURT: This vessel carries crew and machinery. Where does it carry them to and from?

MR. BARISH: Well, they were brought – the machinery was on – the machinery is part of the dredge.

THE COURT: Right.

MR. BARISH: The crew was brought in and out by way of –

THE COURT: Another boat.

MR. BARISH: By way of another boat which is part of the fleet. See, one of the things that –

THE COURT: Part of the Dutra fleet?

MR. BARISH: Pardon me.

THE COURT: Is part of the Dutra fleet?

MR. BARISH: Yes.

MR. BARISH: Yes.

1. The things that the defendant fails to recognize is that we are talking about a fleet of vessels, and the fleet of vessels are set forth in the Lawrence case, [25] the fleet of vessels is what governs. That is the concept of the fleet doctrine which emanated from the Fifth Circuit and has been adopt by the Supreme Court of the United States.

THE COURT: But there the issue – even if you bring in a fleet, the issue isn't whether he worked on that fleet because the fleet you are talking about is the fleet that brings him to –

MR. BARISH: That vessel is parked in the –

THE COURT: Let met just finish this.

MR. BARISH: Yes.

THE COURT: The fleet you are talking about is the fleet that comes from the shore to the dredge.

MR. BARISH: Yes.

THE COURT: Now, there is no issue as far as I can – as far as I read the paper, there is no issue about him working on those boats.

MR. BARISH: No.

THE COURT: He worked on the scow, that thing where he fell and the SUPER SCOOP, and so the question is even if there is a fleet –

MR. BARISH: Right.

THE COURT: It's a connection – it is his connection to the fleet other than as a passenger. He is a passenger on those work boats.

[26] MR. BARISH: No. The fleet for this purpose is the scow, the dredge. You see, what's happened here, Your Honor, if I may.

THE COURT: Yes, but before you leave that point, you say it's the scow and the dredge.

MR. BARISH: And the other vessels, but I don't have to get there. Can I just tell you what I really think this is about?

THE COURT: Yes.

MR. BARISH: This is about a false analogy. This is not about whether DiGiovanni applies or doesn't apply. We are assuming DiGiovanni applies.

We are saying that the cases make it clear that DiGiovanni shouldn't be extended.

Now, in this case, in DiGiovanni, we had a barge that was MO, secured to the bridge by spuds, did not engage in any navigable function such as the transportation of crew supplies or equipment and was the – decided to be a work platform. The gentleman who was involved – DiGiovanni had never done any seaman's work, had never been at sea. This case is entirely the opposite.

In DiGiovanni, we had a piece of equipment secured to a bridge, building the bridge. It's a false analogy to say that this dredge here, that these dredgers were engaged in building the tunnel. These dredges were engaged in [27] dredging, deepening the channel which has always been seaman's work.

THE COURT: Let me just – what DiGiovanni says, Mr. Barish, is that the purpose of the instrumentality, primary purpose, to transportation of people and equipment.

MR. BARISH: Right.

THE COURT: Now, where does the SUPER SCOOP fit into that construct?

MR. BARISH: Well, first of all, the SUPER SCOOP does have equipment and does transport equipment and does transport supplies and does transport, quite contrary to what was said, and does transport people.

THE COURT: Where does it say that in your papers that it does that? All I see in the papers, that it does dredging, and it has this crane on it.

MR. BARISH: Okay. Fine. They move the SUPER SCOOP from one place where it dug down to widen the channel to another place where it digs down and widens the channel to another place, doing it according to the defendant's own papers, no less than six times a day.

Now, when that vessel is moving, it is moving with the crew aboard it. The problem with DiGiovanni as he has stated it, is that DiGiovanni is not one ruling. DiGiovanni is two rulings. DiGiovanni says that a vessel –

THE COURT: Can I stop you one minute –

[28] MR. BARISH: Yes.

THE COURT: – before you go on.

You say it moves with crew on it?

MR. BARISH: Sure.

THE COURT: And he says it doesn't move with crew on it.

MR. BARISH: He is wrong. Calling me his brother doesn't alter the fact that he is wrong.

THE COURT: Is there a dispute about whether there is people on this thing?

MR. CONNELLY: Your Honor, as I believe was cited in my brief, and when I say cited, to various deposition transcripts, the vessel, the SUPER SCOOP moves about six times a day, about 30 feet each time; that is it. It's digging a channel across. That is where it moves. It's going to be towed any distance, people are not on it.

MR. BARISH: But when it's moved, Your Honor, the people are on it.

MR. CONNELLY: For those 30 feet, for those 30 feet or moving to the next digging spot, they are not going around the harbor picking spots. They are digging in a line; that is why as stated in the deposition of at least I think two people, I think possibly three, it moves about 30 feet at most, six times a day, 30 feet in the same line, not moving around all the harbor digging holes everywhere.

[29] MR. BARISH: Your Honor, it's been admitted these people are aboard that vessel 12 or 13 hours a day, and when it moves, they move with it.

(Pause.)

THE COURT: Okay. Go ahead, Mr. Barish.

MR. BARISH: As I started to say, Your Honor, DiGiovanni is not one ruling. It's two rulings. DiGiovanni says that if a barge does not engage in transportation, does not carry supplies, does not carry equipment for the maritime purpose for which it is being used, then a member of – a worker on that barge can only be deemed to be injured on a vessel in navigation when the vessel is actually moving.

We don't get to that second issue. That second issue isn't here, because the first issue in DiGiovanni is that this vessel was on navigable waters, moving around on navigable waters, carrying crew, carrying equipment, and therefore, was not a work barge secured to land.

The second aspect of DiGiovanni that deals with the vessel has to be moving only comes into play, Your Honor, if the vessel has – is not a vessel in navigation. If the vessel is tied to the land as in – secured to the land as in DiGiovanni or secured to pilings as in Hatch, and the man is not engaged in maritime work at all, he is standing on

the pier holding a line, then he can be a [30] maritime worker or a seaman only in the situation where the vessel is actually moving and he is aboard it. But once it's established that the vessel is on navigable waters, that the vessel does engage in an navigable endeavor, dredging has always been a – determined to be a navigable – dredging has always been deemed to be seamen's work.

THE COURT: Mr. Barish, why isn't this movement that you are talking about –

MR. BARISH: Pardon me.

THE COURT: Why isn't this movement, the 30 feet, six times a day just incidental to its primary purpose which is dredging?

MR. BARISH: Right.

THE COURT: Why isn't it? I mean if we were talking about the boats that bring these men out to the SUPER SCOOP, we would say of course it seems to me, but the primary purpose of those boats is to transport people. In the case of the SUPER SCOOP, they happen to be there, because that is their work, and you have to move the thing to get it to do the dredging operation. So why isn't it the primary purpose of the SUPER SCOOP dredging, and that movement is just incidental to the dredging?

MR. BARISH: The primary purpose of the SUPER SCOOP is dredging.

[31] THE COURT: That's right.

MR. BARISH: Dredging is dredging.

THE COURT: If you make that – if that is what you say, then you lose, because DiGiovanni – excuse me.

Because DiGiovanni says the primary purpose must be transportation.

MR. BARISH: No, Your Honor.

THE COURT: It don't say that?

MR. BARISH: No, it don't say that.

THE COURT: Wait just a minute. Let me get the case out and see if I can read that part to you.

MR. BARISH: Read the part where it says that the vessel –

THE COURT: I will read the part where it says the primary purpose.

MR. BARISH: Any travel such as transportation of crew supplies or equipment. The barge is equipment.

THE COURT: Let me just see here.

MR. CONNELLY: If I may, Your Honor, Page 1123.

THE COURT: 1123.

MR. BARISH: What do you have, a one sentence scribner?

THE COURT: 1123.

MR. CONNELLY: That is the page I had cited in my brief, Your Honor.

[32] THE COURT: In sum if a barge or other float's purpose for primary business is not navigation or commerce, then workers assigned thereto for a short

enterprise are to be considered seamen only when it's in actual transit.

Now, if you tell me, Mr. Barish –

MR. BARISH: Yes, sir.

THE COURT: – the primary purpose of this float is dredging –

MR. BARISH: Your Honor. if I may –

THE COURT: I haven't finish the question yet, Mr. Barrack [sic]. Do you want to wait until I finish?

MR. BARISH: Yes.

THE COURT: I'd appreciate it.

MR. BARISH: I will.

THE COURT: All right. If you tell me that the primary purpose of this float is dredging, then by the definition of DiGiovanni, it is not a vessel, because it says that the primary purpose must be navigational commerce.

MR. BARISH: Yes. That means that a vessel must be in navigation. It doesn't mean it has to be traveling.

THE COURT: No, that is not what it says. What I have just said, what I have just read to you is that:

In sum if a barge or other float's purpose or primary business is not navigational commerce, then workers assigned thereto for a short enterprise are to be considered [33] seaman only when it is in actual navigation.

MR. BARISH: Yes. Your Honor –

THE COURT: This case does in fact take into account the actual navigation. It says its primary purpose is something else. Tell me that is not what DiGiovanni says.

MR. BARISH: Well, in the first place, it's not what it says.

THE COURT: Listen. DiGiovanni –

MR. BARISH: In the second place –

THE COURT: Just a minute. Let me –

MR. BARISH: – navigation, Your Honor.

THE COURT: DiGiovanni also says floating is not enough.

MR. BARISH: That's right. But when you are –

THE COURT: Nor is capability of navigation across navigable waters enough.

MR. BARISH: That's right.

THE COURT: That is what it says.

MR. BARISH: And I agree. But what we are doing here is dredging which is aiding navigation and commerce.

THE COURT: That is not what this case says. This case says:

> "Whether it is designed or used primarily for the transportation of cargo, equipment [34] or persons across navigable waters."

MR. BARISH: Right. Okay. That is it. That the test is did this vessel engage in a navigable function?

THE COURT: That's not what – I just read to you what the test was.

MR. BARISH: No. Such as transportation of crew, supplies or equipment, and that is what this vessel did.

THE COURT: You acknowledged to me just a few minutes ago in my hearing, that the primary purpose of this vessel, of this float was dredging.

MR. BARISH: Yes. But in order to dredge –

THE COURT: Excuse me. Excuse me.

MR. BARISH: But –

THE COURT: Excuse me.

THE COURT: Excuse me.

The case DiGiovanni says the primary purpose for a float to be a vessel is the transportation of cargo, equipment or persons, not dredging. It doesn't say anything about dredging.

MR. BARISH: That is because DiGiovanni didn't have anything to do with dredging.

THE COURT: It doesn't have anything to do with dredging.

MR. BARISH: DiGiovanni dealt with a vessel that was secured to a dock. You cannot dredge, you cannot dredge without having a vessel which is in navigation that carries [35] a crew, carries cranes, and therefore, that vessel is a vessel in navigation as distinguished from the work platform which is secured to the dock.

This vessel we didn't have to worry about whether it could be moved out in navigable waters. It was at navigable waters. It was being moved.

THE COURT: The case says that doesn't matter. The case doesn't say – the case says that the capability of moving across navigable water is not enough. It says that. I am looking right at it.

MR. BARISH: Okay.

THE COURT: It says floating is not enough, nor is capability of movement across navigable waters.

Mr. Connelly, do you have anything else you want to say about this?

MR. CONNELLY: Not really, Your Honor. I did make a mistake. The BETTY F in DiGiovanni did have a rig bow as well and a brake stern, but I misspoke it.

THE COURT: Yes.

MR. BARISH: Yes. Your Honor, I don't know how I can express this any differently than I did. The barge in this case was engaging in a navigable function. The navigable function was transporting the crew, transporting equipment. That is the difference between a barge and a work platform.

[36] THE COURT: Mr. Barish, you have changed your position. Your position when I asked you a minute ago was this barge or this float was engaged in its primary purpose was in dredging, that is what you told me; didn't you tell me that?

MR. BARISH: But in order to perform off shore dredging, you have to be able to transport the people and

the equipment over navigable waters, and that is what the test is. You can't compare DiGiovanni stuck to a bridge with that.

THE COURT: The test is its primary purpose, not the fact that it can do that.

MR. BARISH: You are misunderstanding me, Your Honor.

THE COURT: Thank you very much. I appreciate that, and I deny your – I am going to deny –

MR. BARISH: It's my fault.

THE COURT: I am going to grant the motion for summary judgement with respect to the – with respect to the seaman status, the motion is granted. It's denied with respect to the Long Shore Act, and we are done.

Thank you very much.

MR. CONNELLY: Thank you, Your Honor.

THE COURT: Thank you.

MR. BARISH: Right. Your Honor, we will be [37] appealing this, immediately.

THE COURT: I am sure you are.

MR. BARISH: Is that okay?

THE COURT: It's not up to me. You have to go to trial because the First Circuit is going to have to deal with that. Let me just say, explain to you my reason. My reason is that Mr. Barish explained to me that this float, the primary purpose of this float was dredging. The DiGiovanni case says that the primary purpose in order to

make a vessel a float – a vessel, the primary purpose must be it's transportation of cargo or equipment.

MR. BARISH: Yes.

THE COURT: And not only what you say but also the record shows that the primary purpose of this thing, of this SUPER SCOOP is dredging, not transportation.

The fact that it moves people across the water is incidental to its primary purpose, and for that reason, I am granting the summary judgement motion with respect to the seaman status.

With respect to the Long Shore Act, I think there is a question about when the railing was up and whether that was a responsibility of the owner or responsibility of the employer.

Thank you very much.

MR. BARISH: Thank you, Your Honor.

[38] MR. CONNELLY: Thank you, Your Honor.

THE CLERK: All rise.

(Recess.)

REPORTER'S CERTIFICATE

I, TERI CELESTE GIBSON, Certified Shorthand Reporter, do hereby certify that the foregoing pages 1 through 38, are a true and accurate transcription of my stenographic notes taken in the above-entitled hearing,

prepared to the best of my knowledge, skill, and ability at the time and place aforementioned.

TERI CELESTE GIBSON, CSR DATE
OFFICIAL COURT REPORTER

This certificate only applies to transcripts produced, copied, and signed by Teri Celeste Gibson, Official Court Reporter.

APPENDIX F

1 U.S.C. § 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

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46 U.S.C. App. § 688.

(a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by (a) vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

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33 U.S.C. § 902.

When used in this chapter –

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include –

* * *

(G) a master or member of a crew of any vessel;

* * *